

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

1621 ROUTE 22 WEST OPERATING
COMPANY, LLC d/b/a SOMERSET
VALLEY REHABILITATION &
NURSING CENTER

Employer

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST NEW JERSEY REGION

Petitioner

Case No. 22-RC-13139

**HEARING OFFICER'S REPORT AND RECOMMENDATIONS
ON OBJECTIONS**

This report contains my findings and recommendations regarding the Employer's objections to the election in 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center, Case No. 22-RC-13139. For the reasons contained herein, I recommend overruling the Employer's objections and issuing a certification of representative.

Procedural History

Pursuant to a Stipulated Election Agreement, signed by 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center, herein called the Employer, and 1199 SEIU, United Healthcare Workers East, New Jersey Region, herein called the Petitioner or the Union, and approved by the Regional Director for Region 22 of the National

Labor Relations Board on August 10, 2010,¹ an election by secret ballot was conducted on September 2 among the employees in the following unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey facility, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefit coordinators, all other professional employees, guards and supervisors as defined in the Act.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	60
Number of void ballots	0
Number of ballots cast for the Petitioner	38
Number of votes cast against participating labor organization	28
Number of valid votes counted	66
Number of challenged ballots	5
Number of valid votes counted plus challenged ballots	71

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for 1199 SEIU United Health Care Workers East New Jersey Region.

Thereafter, the Employer filed timely objections to conduct affecting the results of the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director for Region 22 conducted an investigation, and on September 22 issued and served on

¹ All dates hereinafter are in 2010 unless otherwise indicated.

the parties a Report on Objections and Notice of Hearing, in which he directed that a hearing be held by a duly designated Hearing Officer regarding the Employer's objections.

A hearing was held before the undersigned on October 12, 13, 14, 15, 20, 25, 26, 29 and November 3, 4, and 8 in Newark, New Jersey.

The Petitioner and the Employer appeared at the hearing, were represented by counsel and afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues, and present oral argument.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Employer's objections.²

Request to Withdraw

At the close of the hearing, the Employer requested permission to withdraw Objections Nos. 8 and 14. Tr. at 1275. I recommend approval of the Employer's request to withdraw these two objections.

Objections Nos. 1 and 2

In its first objection, the Employer alleges that during the critical period prior to the election, the Union published and distributed pro-Union literature and videos containing employee photographs and statements purportedly made by employees that were obtained by deceit and misrepresentation, were obtained and used without employees' permission, and were false statements not made by employees. In its second objection, the Employer alleges that the

² References to the transcript are identified as Tr. ___. References to the Board, Petitioner and Employer's exhibits will be cited as Bd. Ex. ___, Pet. Ex. ___ and Er. Ex. ___, respectively. There are also two exhibits in the record which were offered jointly by the Petitioner and the Employer. Those exhibits are referred to as Jt. Ex. 1 and Jt. Ex. 2.

Union distributed the flyer and videos without including a disclaimer explaining that the employees depicted were not necessarily supporting the Union, or that the literature was not intended to reflect the views of employees appearing in the literature and video.

Facts

The facts regarding these objections are largely undisputed.

The Flyer and the Videos

The Union prepared a campaign flyer, Employer Exhibit 1, and two videos, Petitioner Exhibit 3, which were distributed to employees during the critical period. Tr. at 54, 1112. The flyer is a folded poster which contains photographs of and quotations from employees expressing support for the Union. On the cover, there are two photographs of groups of employees and states, “At Somerset We’re Voting Yes for 1199SEIU!” When open half way, the flyer has a large box in the middle of the page which reads “Our Opportunity to Vote Yes is Here!” with details about the election. There are quotations attributed to individual employees expressing their support for the Union, most of which are accompanied by photographs of the employees. When fully opened, the flyer states “We’re voting yes for 1199SEIU!” in large print in the center of the page. There are additional quotations from and photographs of employees expressing support for the Petitioner. Approximately 48 employees are quoted on the flyer. The return address on the flyer is the Petitioner’s New Jersey office. The flyer also advises employees to call the Petitioner’s organizer Brian Walsh for more information. Er. Ex. 1.

The two videos begin with screens which read “Care One Somerset Nursing and Rehab Workers Speak Out.” The videos include short testimonials from approximately sixteen employees discussing why they are supporting the Union. Employees address the camera and state why they want a union. The videos both conclude with a screen giving employees a

number to call for more information, and a final screen which reads “1199SEIU United Healthcare Workers East.” Pet. Ex. 3.

The Releases

The Petitioner collected release forms from approximately 49 employees. The release form states: “I hereby give to 1199SEIU United Healthcare Workers East, their successors and assigns, my permission to use pictures made of me and comments made by me on this date in video tapes, printed material, digital and online media, advertisements, and any other materials. I further agree to indemnify and hold harmless 1199SEIU United Healthcare Workers East, their successors and assigns, from and against any and all liability that might arise out of any use or publication of said comments and pictures.” Er. Ex. 2. The release contains spaces for employees to write their name, sign the form, and include contact information. The release also provides space for employees to write short answers to two questions: “Speak from the heart – How does having a union improve your life and/or the life of your family? Be specific.” and “How does having a union help you provide better care? Be very specific.” The Union used the answers to these questions and the videos as the source for the quotations which appear on the flyer. Tr. at 61 (Walsh), 268 (Elliott). The form contains a line for someone to witness the release. That line is blank on many of the forms in Employer Exhibit 2. Others were “witnessed” by someone, often another employee of the Employer.

Ricky Elliott, the Petitioner’s vice president for new organizing for Upstate New York and New Jersey, testified generally about the Petitioner’s practices regarding release forms. Elliott did not obtain releases from any Somerset employees. Tr. at 267. He explained that when the Petitioner takes a photograph or video of an employee, its practice is to obtain a signed release form from the employee. The individual may sign the release form before or after the

photograph or video is taken. Tr. at 268-69. Elliott testified that sometimes employees give Union organizers permission to use their photographs verbally, but the Union attempts to get signed forms from employees. Tr. at 271. Elliott testified that it is up to the organizers to make sure there are signed releases for any employees whose photographs and videos are made public. Tr. at 269-70.

Brian Walsh, one of the main organizers of the campaign at the Employer's facility, testified about his own use of the releases during the campaign at the Employer's facility. He explained to employees that the Petitioner would make a flyer looking like Employer Exhibit 1 and mail it to employees. Tr. at 55. Walsh testified that he made sure employees read the release form and understood how it would be used. Tr. at 37. He stated that he personally did not take any photographs of Somerset employees unless they had already signed a release form. Tr. at 39. Walsh also testified that he took video of approximately three employees and made sure he obtained signed releases from those employees as well. Tr. at 73. Isabelita Sombillo, another Union agent, also took photographs and video of employees. Tr. at 33-34. Walsh stated that Sombillo was not involved in obtaining releases. Tr. at 34. Walsh also testified that he checked to make sure the release forms the Union obtained from Somerset employees were all signed. Tr. at 1124. Walsh did not sign the witness line on any releases he obtained. Tr. at 45.

The Flyer

A comparison of Employer's Exhibits 1 and 2 reveals that with a few exceptions, the quotations on the flyer are substantially similar to the answers employees provided on their releases. In some cases, the quotations are virtually verbatim. For example, the quotations attributed to employees Susan Chillemi, Sheena Claudio, and Courtney Moore appear almost exactly as they appear on the releases for those employees. Er. Ex. 1; Er. Ex. 2 at 14, 15, 37.

Approximately twenty of the quotations contain the words “I’m voting yes,” and then cite a reason provided on the release forms, even though the words “I’m voting yes” do not appear on any of the releases. For example, the quotation attributed to Tracey Thomas, a recreation assistant, states, “I’m voting yes so I don’t have to worry about job security.” Thomas signed a release form. In response to the question “How does having a union help you provide better care?” Thomas wrote, “less worrying about job security.” Er. Ex. 1, Er. Ex. 2 at 59. Thomas also appears in the union’s campaign video stating “I want to form a union.” Pet. Ex. 3.

Similarly, Keisha Rice, a receptionist, is quoted on the flyer as stating, “I’m voting yes for better benefits and better staffing.” Rice also signed a release form. On that form, in response to the question, “How does having a union improve your life and/or the life of your family,” she wrote, “Better benefits, better staffing that is also better for the patients here in the facility.” Er. Ex. 1, Er. Ex. 2 at 46. During her testimony, Rice initially confirmed that she signed a release, then testified that she did not remember signing a release. She admitted that the release contained in Employer Exhibit 2 has her signature. Tr. at 843. She stated, “this is my signature, but it was a while ago, I could have signed it, and maybe I just don’t have any recollection of it.” Tr. at 844. She further testified that she did not give the Union authority to publish “I’m voting yes” on her behalf Tr. at 844.

The flyer quotes Doreen Dande, an licensed practical nurse (LPN), as stating, “I’m voting yes for more respect.” Er. Ex. 1. Dande signed a release form. In response to “How does having a union improve your life and/or the life of your family?” Dande wrote, “Job security. Respect. Good fortune. Comfortable.” Er. Ex. 2 at 18. At the hearing, Dande testified that the release contained her signature and her writing, but stated that the release “does not look like the form that I filled.” Tr. at 593. Dande explained that she recalled signing a card, but not a sheet

of paper like the release. Dande specifically recalled reading the question asking how a union would improve her life and the life of her family and writing the answer, but again insisted that she wrote that information on a card, not a release. Tr. at 596-97, 598-99. Dande testified that she never stated, or authorized anyone else to state, that she was voting for the Petitioner. Tr. at 597.

Enid Hacker Jones, a certified nursing assistant (CNA), is quoted on the flyer as stating “I’m voting yes for 1199 because I know we’re stronger together.” Er. Ex. 1. Hacker Jones signed a release. Her responses on the release state “you can rest a sure that the union is there for you.” Er. Ex. 2 at 24. Hacker Jones did not testify.

Fanny Mora’s photograph appears on the flyer with a quotation stating “I am voting yes to improve resident care and have less stress on the job.” Er. Ex. 1. Mora, a dietary aide, signed a release form as well. Er. Ex. 2 at 40. Mora could not recall signing the release, whether she read the release before she signed it, or whether anyone translated it into Spanish for her,³ but confirmed her signature appears on the release. Tr. at 968, 1168. Mora was unable to state whether she had written her cell phone number on the form, but confirmed that the cell phone number on the form was in fact her number. Tr. at 1164. Mora’s release form contains answers to the two questions. The answer to the question “How does having a union help you provide better care?” states in part, “to not be so stress at my job.” Mora stated that she did not write the answers that appear on the form. Tr. at 968-69, 1164, 1166-67. Mora also explained that she voluntarily had her photograph taken, but did not know that the photograph would be used for the flyer. Tr. at 1165. She testified that she did not give anyone authority to state that she was voting for the Union. Tr. at 1168.

³ Mora testified through a Spanish interpreter.

Miguel Roque, a CNA, also appears on the flyer. His picture is accompanied by the quotation “I’m voting yes for 1199.” Er. Ex. 1. He testified he remembered signing small card, but not a release form. Tr. at 808. Roque testified that he never authorized the Petitioner to use his picture, his name, or state that he was voting for the Petitioner. Tr. at 803. The Petitioner did not produce a release form for Roque.⁴ Roque also testified that Shannon Napolitano, an LPN who worked for the Employer and supported the Union, took his picture and said something to him about having a Union. Tr. at 810. Roque admitted that he told co-workers that he was going to vote for the Petitioner. Tr. at 810-11.

Forms Signed by Jillian Jacques as a Witness

Jillian Jacques is employed by the Employer as an LPN. Tr. at 373. During the election, she served as a “roving” observer for the Petitioner.⁵ Tr. at 375-76. Jacques signed the witness line on approximately a dozen release forms for other employees. She testified that for many of these forms, she was not present when the employees filled out the form, but signed the witness line when she received the forms at a later time. Tr. at 401-418.

Jacques filled out some of the short answers for employees. In some cases, Jacques filled in the answers after she spoke to the employees about their forms. For example, Jacques testified that she completed short answers for Maria Granda, Kwame Sarpong, and Adele Scotto DiCarlo after speaking with them about what she should write. Tr. at 408, 410-16, Er. Ex. 2 at 23, 51, 52. Jacques completed answers for Elsa Rivera after speaking with Rivera through a translator. Tr. at 410-11, Er. Ex. 2 at 47. In other cases, Jacques testified that she wrote answers on employees’

⁴ There are two other employees whose names appear on the flyer and for whom there is no release in Employer Exhibit 2, Claudine Hunter and Hector Gonzalez. Neither employee testified. There is no evidence in the record regarding whether these employees gave the Petitioner permission to use their names in its materials.

⁵ As explained more fully below, the parties agreed to have “roving” observers who walked through the corridors of the Employer’s facility holding signs which read “time to vote.”

release forms without speaking with them prior to doing so. For example, Jacques admitted that she completed an answer to “How does having a union help you provide better care?” for Annie Stubbs without speaking to Stubbs. Tr. at 417, Er. Ex. 2 at 57. Stubbs appears on the flyer, but is quoted from her own answer to the question about how a union will improve the life of her and her family. Er. Ex. 1, Er. Ex. 2 at 57. Jacques also admitted that she completed answers on a release form signed by Maria Berrios without speaking to Berrios. Tr. at 404. Jacques wrote answers to both questions on Berrios’s form, and included the phrase “education opportunity for myself.” Er. Ex. 2 at 11. Maria Berrios is quoted on the flyer as stating, “I’m voting yes for educational opportunities.” Er. Ex. 1. Berrios also signed another release, which she completed in Spanish. On the Spanish copy of her release, Berrios indicated that she wanted better salary, better hours, and more respect. Er. Ex. 2 at 7. Berrios also appears in the Union’s video stating that she wanted to form a union for better benefits, better salary, and better hours. Pet. Ex. 3.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of these witnesses, I generally credit their testimony regarding these two objections. I note that the testimony on these facts is largely uncontested. Both Union agents testified credibly about the Petitioner’s use of the release forms. While several employees testified that they could not recall signing a release form, they all admitted that the release forms in evidence contained their names and handwriting. With regard to Dande’s testimony, while she insisted that she only recalled signing a card, not a release form, she also admitted that her signature appears on a the release form and that she answered the questions on the form.

Fanny Mora also admitted that the release shows her signature, although she could not recall signing the release. I credit Mora’s testimony that she did not fill out the answers on the

form. Miguel Roque testified in a straightforward manner that he did not sign a release form, but admits that he stated he was going to vote for the Petitioner.

Jillian Jacques testified in a straightforward manner and without rebuttal about releases she signed as a witness. She also explained in detail the circumstances of release forms containing her handwriting in the short answer sections, including whether or not she had spoken to employees about their answers before completing these answers.

Discussion

In its first objection, the Employer alleges that during the critical period prior to the election, the Union published and distributed pro-Union literature and videos containing employee photographs and statements that were obtained by deceit, misrepresentation and without employees' permission, were used without the employees' permission, and were false statements not made by employees. The record evidence does not support this objection.

The Board has long held that misrepresentations in campaign propaganda do not constitute grounds for setting aside an election. See Midland National Life Insurance Co., 263 NLRB 127 (1982); see also TEG/LVI Environmental Services, Inc., 326 NLRB 1469 (1998). In such cases, the Board will not consider the accuracy of campaign claims, but will allow employees to evaluate such claims for themselves. Midland National Life Insurance Co., 263 NLRB at 131, 133. The Board will intervene only in cases where voters could not recognize the material as propaganda, such as in the case of forgery. Id. The Board has found that minor misrepresentations of quotations attributed to employees are not objectionable. In BFI Waste Services, 343 NLRB 254 (2004), the Board stated, "we do not condone the creation and attribution of quotes to employees, at least the union makes no pre-publication effort to verify that the quotes fairly represent the views of the quoted employees." The Board noted that at

most only two employees were “arguably misrepresented.” BFI Waste Services, 343 NLRB 254 at fn. 2.

The Employer points to irregularities between the flyer and the releases signed by employees to demonstrate that employees were not accurately quoted. For example, the inclusion of the words, “I’m voting yes” on quotations, even though none of the releases contain those exact words. In addition, the Employer argues that many of the releases are not valid. The Employer points to the quotation from Fanny Mora, who testified that she did not fill out the release form she signed, although she admits that the release shows her signature. In addition, the Petitioner included a quotation from Miguel Roque on the flyer, stating that he was voting yes for the Petitioner. The record establishes that Roque did not sign a release form or otherwise authorize the Petitioner to use his name or his picture. Roque admitted that he told other employees that he was going to vote for the Petitioner.

The Employer also maintains that the fact that Jillian Jacques provided answers for some employees on the release forms impugns the releases. Jacques admitted that she completed answers for certain employees on their releases. In some cases, Jacques spoke to the employees about their answers, in other cases she did not. The only response included on the flyer that Jacques wrote without previously speaking to the employee was from Maria Berrios, who signed two authorization forms and appears in one of the Petitioner’s videos. Jacques wrote that Berrios stated she was interested in additional educational opportunities, which appears on the flyer, Er. Ex. 1; Er. Ex. 2 at 11, whereas Berrios herself cited better hours, better benefits, and better salary as her reasons for wanting a union. Pet. Ex. 3, Er. Ex. 2 at 7.

The record establishes that many employees were accurately quoted on the flyer. Most of the quotations on the flyer are identical or substantially similar to the information provided by

employees on the release. Further, with the exception of Roque, employees signed a general release allowing the Petitioner to use their photographs and comments in campaign materials, including videos, printed material, digital and online media, advertisements, and other materials. All of the employees who testified, except Roque, confirmed that their signatures appear on the releases. See Sprain Brook Manor Nursing Home, LLC, 348 NLRB 851 (2006) (in which the Board found that it was not objectionable for a union to use photographs of employees in campaign materials where employees had signed consent forms and there was no evidence that the “authorized use of the photographs reasonably tended to interfere with employee free choice in the election.”).

The discrepancies on which the Employer relies are minor. For example, the inclusion of “I’m voting yes” in quotations from employees who have expressed support for the Petitioner by signing a release and answering specific questions about why they would like to be represented by a union does not constitute a substantial misrepresentation. See Gormac Custom Manufacturing, Inc., 335 NLRB 1192 (2001) (in which the Board upheld an election in which the union circulated a leaflet stating, “We’re the Majority! We’re Voting Yes!” where employees had signed a petition authorizing the union to sign their names to leaflets, but did not specifically state that the employees were going to vote yes in the election). Fanny Mora was not accurately quoted in her support for the Union, although the evidence establishes that she signed a release. Although Miguel Roque did not sign a release, he admitted that he was accurately quoted. The quotations attributed to Maria Berrios and Enid Hacker Jones may not accurately reflect their reasons for supporting the Petitioner, but both employees provided signed releases expressing their support. These discrepancies between the flyers and the releases are minor and

do not constitute objectionable misrepresentations under Midland National and BFI Waste Services, supra.

The Employer argues that this case involves forgery similar the kind found in Albertson's Inc., 344 NLRB 1357 (2005) and Mt. Carmel Medical Center, 306 NLRB 1060 (1992). These two cases are distinguishable from the present case as they involve the distribution of documents by one party which appeared to be from another party. In Albertson's, the union distributed a letter to employees regarding alleged budget cuts which seemed to be from the employer because it appeared on what looked like the employer's letterhead. The Board found that this document was an objectionable forgery because employees were not able to discern it for what it was, union propaganda. The Board stated, "The ultimate question, as Midland National makes clear, is whether employees were able – under all the circumstances – to recognize the forged document for what it was." Albertson's, 344 NLRB at 1361. Similarly, in Mt. Carmel Medical Center, the Board found that the employer had engaged in objectionable conduct when it posted a document for employees to read which appeared to be from the union and which employees would not be able to recognize for what it was. Mt. Carmel Medical Center, 306 NLRB 1060 at fnt. 2.

In the present case, there is no reasonable argument that employees could not recognize the flyer or the videos as clear union propaganda. All materials are clearly identified as having been produced by the Petitioner, and were labeled with the Petitioner's name and contact information. The flyer and the videos are precisely the kind of campaign materials which the Board has decided that employees may judge for themselves. See Midland National, supra.

The Employer argues that the irregularities in these releases amount to artful deception, and are therefore excepted from the Midland National standard and are objectionable. In Van

Dorn Plastic Machinery Company, 736 F.2d 343 (6th Cir. 1984), the Sixth Circuit⁶ found that there may be cases “where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.” Van Dorn, 736 F.2d at 348. The record in this case does not support the Employer’s contention. There is no evidence that the misrepresentations were pervasive or that employees had in any way been deceived into signing releases. Although some employees could not remember signing releases, there is no evidence any employees were deceived into doing so.

This case is akin to Champaign Residential Services, Inc., 325 NLRB 687 (1998). In that case, a union circulated a flyer with a heading stating “We are winning! Join us!” The union included 68 photocopied signatures of unit employees under the heading. The Board found that this flyer was not objectionable under Midland National and Van Dorn. The Board stated: “the document here does not constitute a forgery, as it was clear from the face of the flyer that it emanated from the [union] and, with one exception the signatures on the flyer matched those submitted by employees on the Petitioner’s “Vote Yes!” petitions. . . . [T]he record shows that misrepresentations in the gathering and compilation of the signatures were minimal. As the hearing officer found, all employees who signed the petition knew or should have known that their signatures indicated their support for the Union and all but two knew their signatures would be shared with other voters. We conclude that such minor deviations from a perfect recording of employee sentiment does not constitute the type of deception which concerned the court in Van

⁶ Although Van Dorn is a circuit court decision, the Board has considered this exception to the Midland National standard. See U-Haul of Nevada, Inc., 341 NLRB 195 (2004).

Dorn.” Champaign Residential Services, Inc., 325 NLRB 687, fnt. 1 (1998). In the present case, in all but one case, employees signed releases allowing the Petitioner broad use of the information on those releases. There is no evidence that the employees were deceived into signing these releases, or that employees in this case are “unable to separate truth from untruth,” as discussed in Van Dorn.

In its second objection, the Employer alleges that the Union distributed this literature and video without including a disclaimer explaining that the depicted employees were not necessarily supporting the Union or that the literature was not intended to reflect the views of employees appearing in the literature and video.

In support of its objection, the Employer argues that the Petitioner was obligated to include a disclaimer in its materials as required by Allegheny Ludlum Corporation, 333 NLRB 734 (2001). Allegheny Ludlum addressed a case in which an employer included employees in a campaign video. In that case, the Board was concerned about the potential for coercion when an employer solicits employees to appear in a campaign video because employees may feel that an employer is trying to gauge their support for a union and may fear discrimination. The Board ruled that employers may solicit employees to appear in campaign videos, but only if certain safeguards were observed, similar to those provided for in Struksnes Construction Co., 165 NLRB 1062 (1967) (safeguards required before an employer may poll employees) and Johnnie’s Poultry, 146 NLRB 770, 774-75 (1964) (safeguards required before an employer may question employees). In requiring employers to observe these safeguards, which are not required of unions, the Board has recognized “the fact that an ‘employer occupies a far different position with regard to the coercive impact of its action upon employees than does a [u]nion. The Board, recognizing this difference, has frequently applied different standards to the actions of the

employer than it has to similar actions of unions.” Mercy-Memorial Hospital, 279 NLRB 360, 360 at fnnt 1 (1986), quoting Louis-Allis Co. v. NLRB, 463 F.2d 512, 517 (7th Cir. 1972) (in which the Board held that a union could ask supporters to advise the union of coworkers’ promanagement activities); see also Springfield Hospital, 281 NLRB 643, 692-93 (1986) (in which the Board found that it was permissible for a union to ask employees whether they supported the union and to record their responses).

In this case, the Employer cites no other authority for its position that the Petitioner had to comply with the requirements set forth in Allegheny Ludlum and offers no evidence that employees were coerced by the Petitioner in the creation of its videos. None of the employees testified about the videos, although several employees who appear in the video were called as witnesses, including Jillian Jacques, Michelle Moore, and Tracey Thomas. A review of the videos suggests that employees participated in the video voluntarily. The employees in the videos speak into the camera and express their desire for a union and their reasons. Pet. Ex. 3. There is no evidence that employees were in any way coerced to appear in these videos.

Based on the foregoing reasons, I recommend overruling the Employer’s first two objections.

Objections Nos. 3 and 13

In its third objection, the Employer alleges that on the day of the election, the Union, though its agents, engaged in impermissible electioneering around the polling area while employees were proceeding to the polling area to vote. In its thirteenth objection, the Employer alleges that on the day of the election, while the polls were open, the Petitioner’s observer told employees to “vote yes.”

Facts

Background

Prior to the election, the Employer and the Petitioner agreed to have two individuals serve as “roving observers.” The parties signed a stipulation that “[e]ligible voters shall be released from work to vote by roving observers. During the voting times, a roving observer (nonsupervisory employee) for the Union and a roving observer (nonsupervisory employee) for the Employer shall go together to all areas of the facility where eligible voters are working and will jointly hold a ‘Time to Vote’ sign.” Jt. Ex. 2.⁷ The parties sent this agreement to the Regional Office and asked that it be included as part of the Stipulated Election Agreement in this case, but the Regional Office would not attach it to or incorporate it into the Stipulated Election Agreement. Tr. at 1228. When the parties received the fully executed Stipulated Election Agreement from the Regional Office, it did not include the roving observer agreement. Jt. Ex. 1. Jillian Jacques and Jessie Ikurekong served as the roving observers for the Petitioner and the Employer respectively. Tr. at 201.

It is undisputed that at the morning session, which was supposed to run from 5:45 a.m. to 6:45 a.m., the polls opened approximately ten minutes late. As a result, the parties agreed to keep the polls open an additional ten minutes at the end, so the morning session actually ran from approximately 5:55 a.m. to 6:55 a.m. Tr. at 112 (Walsh); 247 (Illis); 299 (Elliott). An announcement was made over the Employer’s telephone system alerting employees that the polls were open. Tr. at 299-300 (Elliott); 885 (Konjoh).

The physical layout of the Employer’s facility is relevant to these objections. Employer’s Exhibits 4 and 5 are floor plans of the facility. Exhibit 4 is a floor plan of the entire facility.

⁷ The copy of this agreement in the record is signed only by the Employer’s attorney. At the hearing, the parties stipulated that the agreement was fully executed by both attorneys prior to the election. Tr. at 1227.

Exhibit 5 is an enlarged detail of Exhibit 4, which includes the conference room used for the election and the surrounding area. Certain locations are identified by number on this Employer's Exhibit 5. The main entrance of the facility leads into a large lobby area (#2 on Er. Ex. 5). The admissions office (#1 on Er. Ex. 5) is to the left of the lobby and the reception desk and the administrator's office (#3 and #4 on Er. Ex. 5) are to the right. Tr. at 163 (Illis). Walking straight through the lobby leads to a corridor, which leads through a set of double doors to the nurses' station. There is a bulletin board with cards on one side of the double doors and two cases containing photographs on the other side (#8 on Er. Ex. 5). Tr. 164-65 (Illis). This area is visible in photographs that were entered as Employer's Exhibit 6B and 6C. The corridor splits at the nurses station, which is triangular in shape. The conference room which was used as the polling place is located along the upper corridor across from the nurses' station (#9 on Er. Ex. 5).

The Employer's Witnesses

Inez Konjoh

Inez Konjoh, the Employer's Director of Nursing, testified for the Employer. Konjoh testified that at about 6:45 a.m., while the polls were still open, she was entering the corridor that leads to the nurses' station. Tr. at 858-59. Konjoh saw the Petitioner's roving observer Jacques about five feet in front of her, facing away from Konjoh, standing by the two cases on the wall displaying photographs next to the double doors. Tr. at 859, Er. Ex. 5 at #8. Jacques was stationed several feet from the conference room where the election was held. Er. Ex. 5 at #9. Konjoh and Jacques were walking in the hallway in the same direction. Tr. at 914-15. Konjoh testified that she heard Jacques tell another employee named Shani "You have ten more minutes to vote. Vote 'yes.'" Tr. at 858, 860. Konjoh said to Jacques, "You can't say that." Jacques turned around and said, "I didn't say anything." Konjoh said, "You cannot say 'vote yes.'"

Jacques said, “You’re lying on me. Shani come back here and tell me if I said that.” Tr. at 859-60. Ikurekong, the other roving observer, was standing across the hallway from Jacques at the time. Tr. at 887.

After this exchange, Konjoh went to the admissions office in the Employer’s facility and related this incident to Doreen Illis, the administrator of the facility, and one of the Employer’s attorneys. Tr. at 890-91. She testified that she spoke to Illis and the attorney for approximately one or two minutes. Tr. at 895-96, 897. After this conversation, Konjoh went to the nurses’ station, again passing Jacques and Ikurekong in the corridor. Konjoh could not recall where she saw Jacques and Ikurekong at this time, just that she passed them. Konjoh stated she was not paying attention to where Jacques was standing. Tr. at 898, 900. Konjoh could not remember why she went to the nurses’ station or how long she spent there, but stated it could have been a minute or two but not as long as five minutes. Tr. at 902-03. Konjoh testified that as she was leaving the nurses’ station, she again saw Jacques, who was standing in the lower corridor by the Employer’s social services office. This office is on the other side of the nurses’ station from the conference room where the election was held. Er. Ex. 5. Again, both Jacques and Konjoh were walking, moving the in same direction, and Jacques was a few feet ahead of Konjoh, facing away from her. Tr. at 860, 915. According to Konjoh, Jacques said, “vote yes.” Jacques then turned around, saw Konjoh, and said “or no” in a lower tone of voice. Tr. at 861. Konjoh could not identify any employees to whom Jacques was speaking or how many employees were in the corridor at the time because she “wasn’t paying attention.” Tr. at 901. According to Konjoh, Ikurekong was two feet away from Jacques when this occurred. Tr. at 903.

Konjoh then went to the admissions office to speak to Illis and the attorney, who were leaving the admissions office when she arrived. Tr. at 904. Konjoh went back to the nurses' station. On her way back, Union agent Ricky Elliott was coming into the facility and Konjoh heard Jacques tell him that Konjoh was "lying on [her] today." Tr. at 906.

Richard Speas

Richard Speas also testified for the Employer. Speas is employed by Healthbridge Management as senior vice president of rehabilitation services. He oversees rehabilitation at Somerset, as well as other facilities. Tr. at 694. At the time of the hearing, he had served in that position for six weeks. Tr. at 687. Prior to serving in this position, he served as the senior vice president for operations for Healthbridge Management for approximately one year. Tr. at 688, 696. In that position, he was responsible for overseeing the operations of the Employer's facility, as well as three other facilities managed by Healthbridge, and 24 facilities managed by Care One.⁸ Tr. at 688, 696.

Speas testified that as vice president of operations, he frequently visited the various facilities he oversaw. Tr. at 697. Speas could not state how many employees worked at these facilities, but stated that Somerset was smaller than many of the facilities. Tr. at 699-700. Speas stated that he knew fifteen employees employed at Somerset, however he could only name four individuals, Doreen Illis, the administrator of the facility, Inez Konjoh, the director of nursing, Shannon Napolitano, and Jillian Jacques. Napolitano and Jacques both served as observers for the Petitioner during the election. Tr. at 700-01. He testified that he had met Napolitano and Jacques prior to the election, but could not recall when. Tr. at 701-02. He stated that he met

⁸ Throughout the hearing, the Petitioner asserted that the Employer's facility is operated by Care One. The Petitioner relies on the Employer's paychecks which bear the name "1621 Route 22 West Operating Company, LLC Care One at Somerset Valley." Pet. Ex. 2. I do not find that this document is sufficient for me to make such a finding. Further, this issue is not relevant to those presented during this hearing.

other employees when he met Jacques, but he could not recall who they were or how many employees were present. Tr. at 702.

Speas testified that on the day of the election, while the polls were open, he was exiting the administrator's office at the Employer's facility and he heard Jillian Jacques say, "You have ten minutes to vote yes." Tr. at 692. Jacques was in the corridor leading into the nurses' station and Speas was on the other side of a wall separating him from Jacques. Tr. at 692; Er. Ex. 5. The wall separating him from Jacques was about eight feet high and did not reach the ceiling. This wall is visible in Employer's Exhibit 6A and 6B. When he heard the statement, he walked into the corridor and saw Konjoh and Jacques. Tr. at 692. He heard Konjoh say, "You can't say that." Tr. at 692. He did not see Jacques when she made the statement, but stated that he heard her voice distinctly. Tr. at 693, 702.

Doreen Dande

Doreen Dande testified that she voted in the morning session at approximately 6 a.m. Tr. at 562, 575. Dande stated that while she was voting, she heard someone say "it is time to vote" and "ten minutes to vote" while she was voting. Tr. at 571. Dande did not identify whom she heard saying this.

Dande testified that during the morning session, she heard Jacques say "it is time to vote" and "time to vote now." Tr. at 572. Dande saw Jacques and Konjoh "having an argument," and heard Konjoh say, "you can't do that here in the building." When asked what Jacques had said, Dande testified "[t]rying to tell people that '[i]t's time to vote', that it's '[t]en minutes to vote.'" Tr. at 573. The Employer's attorney then asked Dande, "Did you ever hear Jillian say that 'It's time to vote yes'?" Dande responded, "I did hear her." The attorney asked her, "How many times did you hear here say that?" Dande responded, "Many times – a couple of times that

morning.” Tr. at 573. She testified that she heard Jacques from the nurses’ station. Tr. at 600. She did not offer any other details about this incident.

Eric Carpio

Eric Carpio, a dietary aide employed by the Employer, voted in the afternoon session between 3:30 and 4 p.m. Tr. at 762, 765. After he voted, he waited in the hallway outside the conference room until the polls closed. Tr. at 778-79. While he was waiting for the polls to close, he saw Jacques and Ikurekong in the hallway. Tr. at 779. According to Carpio, at approximately 4 p.m., Jacques asked Carpio if he had voted. He said he had. Jacques then asked him how he had voted and he replied no. Tr. at 770, 781. Carpio testified that the polls were still open when this conversation took place and that there were still employees coming and going from the conference room, although he could not identify any employees he saw arrive at this time. Tr. at 780.

Michelle Grey

Michelle Grey handles medical records and works in central supply at Somerset. Tr. at 789. She testified that on the day of the election, while the polls were open, Jillian Jacques asked her if she had voted because they had extended the voting time by ten minutes. Grey told Jacques that she had voted. Grey offered no other details of this conversation. Tr. at 793-94.

Jillian Jacques

The Employer also called Jacques. Jacques testified that as the roving observer, her job was to walk around the Employer’s facility and let voters know it was time to vote. Tr. at 375-76. Jacques and Ikurekong both carried signs which read “time to vote.” Tr. at 376, 378. Jacques testified that as an observer, she was allowed to greet voters, but was not to have

conversations with voters. Tr. at 378. Jacques did not wear an NLRB observer badge. Tr. at 395.

Jacques testified that she never had a conversation with any voters while she was carrying her sign. Tr. at 394. She specifically denied that she told voters it was time to vote, that she ever told anyone that it was time to vote yes, or that she ever told anyone that there were ten minutes left to vote yes. Tr. at 394-95. Jacques did not recall asking any employees if they had voted yet. Tr. at 396. Jacques testified that she did not talk to any employees who were waiting to vote. Tr. at 397.

Jacques testified that she did speak to a voter who wanted to know if she still had time to vote. Jacques explained: “What happened is that someone was approaching me and they said is it, do we still have time to vote and I said yes. It was extended because it started late and that was it.” Tr. at 397. This exchange occurred by the bulletin board in the corridor several feet from the conference room where the election was held. Tr. 426. The Employer’s attorney attempted to impeach Jacques arguing that she indeed had a conversation with a voter, even though Jacques claimed she had not, but Jacques testified that she did not consider this brief exchange to be a conversation. Tr. at 397, 399.

The Union’s Witness

Maharanie Mangel is an LPN employed by the Employer. At work, employees call her Shani. Tr. at 1179.

Mangel works from 6:45 a.m. to 3:15 p.m. On September 2, she was running a few minutes late for work, arriving right at 6:45 a.m. She punched in and went to the break room to put her lunch on the refrigerator. Mangel thought that because she arrived at 6:45 a.m., she had missed her chance to vote in the morning session, since that session was supposed to end at 6:45

a.m. Tr. at 1180. In the break room, after 6:45 a.m., a housekeeping employee told Mangel that she had just finished voting. Tr. at 1180, 1192.

When Mangel left the break room, she saw Jacques standing by the double doors in the corridor leading to the nurses' station. Tr. at 1181, 1194. Mangel asked Jacques if she still had time to vote. According to Mangel, Jacques responded, "they have extended the time fifteen minutes more and you can still go and vote." Tr. at 1181, 1196. Mangel testified that Jacques did not say anything else to her and specifically testified that Jacques did not tell her to vote yes. Tr. at 1184. According to Mangel, this exchange was very brief because she was running late for work and wanted to go vote. Tr. at 1198-99.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of these witnesses, I make the following findings regarding credibility.

I generally credit the testimony of Jillian Jacques and Maharanie Mangel. Both witnesses testified in a clear and straightforward manner. I credit Jacques's denial that she told voters it was time to vote yes. With regard to Jacques' exchange with Mangel, their testimony is consistent, detailed, and specific. Both witnesses specifically denied that Jacques told Mangel to vote yes. I further note that the Board has recognized that where the testimony of a current employee is adverse to the Employer, and where the employee is not a discriminatee with any financial interest in the case, that testimony is considered against self interest and more worthy of belief. Evergreen America, 348 NLRB 178, 207 fn.63 (2006); Meyers Transportation of New York, 338 NLRB 958, 968 (2003); Stanford Realty Assoc., 306 NLRB 1061, 1064 (1992); Georgia Rug Mill, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

I do not find the Employer's argument that Jacques's testimony is inconsistent persuasive. The Employer argues that Jacques's testimony is flawed because she first testified that she never had a conversation with any voter, and then admitted that she told a voter there was still time to vote. As Jacques herself explained, she did not consider this brief, innocuous exchange a conversation. Jacques simply answered a question about whether the polls were still opened. There is nothing inconsistent in Jacques's testimony about whether she held a conversation with a voter. Indeed, the comments were consistent with the instructions Jacques received that she was not to have conversations with voters, but was allowed to greet voters.

With regard to the testimony of Konjoh, I do not find her testimony reliable. Konjoh testified that she overheard Jacques make two comments, a few minutes apart. The first comment was Jacques's response to Mangel. When Konjoh overheard this comment, Jacques was both facing and walking away from Konjoh. For the reasons explained below, I also do not find that Konjoh's version of what was said is corroborated by any credible testimony.⁹ Given the circumstances, I find that Konjoh's testimony lacks the strength of Jacques and Mangel's denials. I do credit both Konjoh and Jacques's testimony that Konjoh confronted Jacques about speaking to an employee, and that Jacques denied that she had told Mangel to vote yes.

Similarly, Konjoh testified that she overheard Jacques say, "vote yes or no" ("or no" in a lower voice according to Konjoh) just a few minutes later during the morning session. Again, Konjoh admitted that Jacques was both facing and walking away from her. In addition, Konjoh's recall of this incident was not very detailed. Although just a few minutes after the first

⁹ I note that while Konjoh conceded that Ikurekong was present when Jacques allegedly made both statements, Tr. at 887, 903, the Employer did not call Ikurekong to corroborate Konjoh's testimony. The Board has held that the failure to call an identified, potentially corroborating witness may be considered when determining whether a party has met its burden. See C & S Distributors, Inc., 321 NLRB 404, 404 at fn. 2 (1996); Queen of the Valley Hospital, 316 NLRB 721, 721 at fn. 1 (1995).

incident, Konjoh passed Jacques on her way to the nurses' station, but stated she did not know exactly where she saw Jacques because she was not paying attention. Significantly, Konjoh could not identify any employees to whom Jacques alleged said "vote yes or no," again because she was not paying attention. Given that these events followed Konjoh's initial confrontation with Jacques by just a few minutes, and Konjoh's report of the incident to the Employer's attorney, I do not find it credible that Konjoh was not paying attention to Jacques as she passed her in the hallway or as Jacques was allegedly talking to employees. I credit Jacques's denial that she told employees to vote yes over Konjoh's version of events.

I do not credit the testimony of Richard Speas or Doreen Dande with regard to comments made by Jacques. Until recently, Speas served as the senior vice president for operations at the Employer's facility, as well as for 27 other facilities. Speas testified that in his capacity in these positions, he knew approximately fifteen employees at Somerset. However, he was unable to identify one employee he knew other than the administrator of the facility, the director of nursing, and the Petitioner's two observers, Jacques and Napolitano. Speas could not provide any details about having met these two individuals. He did not know when he had met Jacques or Napolitano. He admitted that he met other employees when he met Jacques, but could not identify any of those employees or even state how many employees he met with her. Moreover, Speas was on the other side of a wall from Jacques when Jacques spoke to Mangel. He was not in the corridor with her and could not see Jacques. Given his lack of familiarity with the employees and his physical location, I do not credit his testimony that he "distinctly" heard Jacques's voice stating that employees had ten minutes to vote yes.

I also find Dande's version of events unreliable. Dande testified that she voted at 6 a.m., shortly after the polls opened. Despite the fact that she voted at six a.m., after the polls had just

opened and would remain open for almost an hour, she testified that while she was voting, she heard someone say “ten minutes to vote.” Tr. at 571. During her testimony, Dande’s recollection was that she heard Jacques say “it is time to vote” and “time to vote now.” Dande also testified that she heard Konjoh tell Jacques that she could not say “it is time to vote” and “ten minutes to vote.” It was only in response to a leading question did Dande add that she heard Jacques say “it is time to vote yes.” When asked how many times she heard Jacques say that, she could not be specific. Dande had no independent recollection of this statement attributed to Jacques. I do not find that Dande’s recollection of what she heard that morning to be reliable, and I credit Jacques’s denial over Dande’s account.

Eric Carpio and Michelle Grey both testified that Jacques asked them if they had voted. Carpio also testified that Jacques asked him how he voted and he told her he voted no. Carpio offered some details about his exchange with Jacques, stating the time and location of this exchange. Grey testified that Jacques told her they had extended the voting time. Carpio and Grey’s testimony bolster each other. Jacques did not recall asking any employees if they had voted, and did not specifically deny this allegation. I generally credit the testimony of Grey and Carpio that Jacques asked them if they had voted and asked Carpio how he had voted.

Discussion

The Board has long held that the “final minutes before an employee casts his vote should be his own, as free from interference as possible.” Milchem, Inc., 170 NLRB 362, 362 (1968). As a result, the Board has prohibited conversations between a party and voters waiting to vote as a means of preventing electioneering in polling places. Id.; see also Pepsi-Cola Bottling Company of Petersburg, Inc., 291 NLRB 578 (1988) (in which the Board found that employee supporters of the union, although not agents of a party, interfered with the conduct of an election

by engaging in “boisterous, prounion conduct” within the no-electioneering area). However, the Board has also recognized that elections must be judged by realistic and practical standards, stating: “The rule contemplates that conversations between a party and voters while the latter in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election.” Milchem, 170 NLRB at 363. The Board will look at additional factors, such as whether the conduct occurred within or near the polling place, the extent and nature of the alleged electioneering, whether the electioneering was conducted by a party or by employees, and whether it was conducted in a no-electioneering area or contrary to the instructions of the Board Agent. Boston Insulated Wire & Cable Co., 259 NLRB 1118, 1119 (1982).

Jillian Jacques served as the Union’s roving observer and held a sign which said “time to vote,” pursuant to an agreement between the Union and the Employer. She did not wear an NLRB observer badge. As a roving observer, Jacques carried her sign in the Employer’s facility while the polls were open so employees would know the polls were open.¹⁰

During the morning session, the polls opened late and as a result were kept open for additional time. At the end of the first session, after the polls were originally scheduled to close, Jacques responded to a question from Mangel, who asked if the polls were still opened. Jacques responded that the polls were still open because the polling time had been extended. In addition,

¹⁰ The Employer asserts, and the Petitioner does not dispute, that Jacques was an agent of the Petitioner in acting as an observer. See Brinks Inc., 331 NLRB 46 (2000). I assume for purposes of this discussion that Jacques was an agent of the Petitioner. However I note that Jacques was an observer only pursuant to a side agreement that was not part of the stipulated election agreement. Moreover, Jacques did not wear an observer badge identifying her to voters as an agent of the Petitioner to employees. Finally, Jacques was not in the polling place, but in fact moved around the Employer’s facility and was remote from the polling place at times.

Jacques asked two employees who had already voted whether they had voted, and how one employee voted.

The facts of this case do not rise to the level of impermissible electioneering under the Milchem line of cases. Jacques's conduct cannot reasonably be characterized as electioneering. The credible evidence in the record establishes that Jacques's interactions with voters were short and pertained to whether the polls were opened, which was an issue during the morning session because of the change in timing of the polls, and whether employees had an opportunity to vote. Significantly, there was no evidence of Jacques conversing with any employee who was waiting to vote. Her comments to Carpio and Grey occurred after these two individuals had voted. Moreover, Jacques was moving around the corridors of the facility during the election. There is no evidence in the record that Jacques spoke to employees in any area that had been designated as a no-electioneering area. See Sewanee Coal Operators' Assn., 146 NLRB 1145 (1964) (electioneering during an election was found not objectionable where Board Agent had not designated a no-electioneering area). Finally, even if Jacques had said "vote yes" to Mangel, this conduct in relation to one voter could not have affected the outcome of the election. See Intertype Co., 164 NLRB 770 (1967) (finding that the remark "[t]hey're going to win. You might as well vote yes" by one employee who had voted to another who was waiting to vote was too trivial to set aside an election). Even crediting Konjoh's assertion that Jacques said "vote yes" (followed by "or no" in a lower tone) in the hallway by the social services office, there is no evidence that any employees heard this alleged comment.

For the reasons stated above, I recommend overruling the Employer's third and thirteenth objections.

Objections Nos. 4 and 12

In its fourth objection, the Employer alleges that during the critical period, including the day of the election while the polls were open, and/or sometime while employees were proceeding to the polling area, the Petitioner improperly electioneered through telephone calls, voicemails, and text messages and/or other electronic communications. In its twelfth objection, the Employer alleges that during the critical period prior to the election, including the day of the election, the Petitioner improperly electioneered and campaigned by telling employees that they knew which employees had voted and by telling employees that the Petitioner was winning the election.

Facts

It is uncontroverted that Union agents sent text messages to and called employees on the day of the election, as two Union agents, Brian Walsh and Jean Venette, testified. At about 2:45 p.m., during the afternoon polling session, Walsh sent text messages to several employees stating: “this is brian from 1199 reminding you to go vote YES!!! election ends at 4!!! we are winning keep it up!!!” Tr. at 85; Er. Ex. 3. Walsh stated he was unsure of the exact number of employees to whom he sent similar messages, but estimated that it was not more than ten voters. Tr. at 86. Walsh testified that he texted employees who had identified themselves as union supporters and were off from work the day of the election. Tr. at 85. He also called the employees he texted and left voice messages for them. Tr. at 90, 121. Walsh did not know whether the employees whom he texted had already voted or where they were at the time he sent them text messages. Tr. at 97, 121. He explained that his representation that the Petitioner was winning was based on the Petitioner’s polling of support prior to the election. Tr. at 98.

Walsh could not recall sending out similar text messages in the morning, but stated that he may have. Tr. at 88-89.

Tracey Thomas and Crystal Pratts, a rehabilitation technician employed by the Employer, both testified that they received this text message from Walsh. Tr. at 813, 817 (Thomas), 706, 711 (Pratts). Thomas did not read this text until she was leaving the Employer's facility. Tr. at 818. Pratts read the text when it came into her cell telephone at approximately 3:15 or 3:30 p.m., and showed it to a co-worker, Elaine Mabilangan. Tr. at 719. Mabilangan, a rehabilitation technician, testified that she saw the text message on Pratts's phone. Tr. at 724. Pratts and Mabilangan had already voted when Pratts received the text message. Tr. at 706 (Pratts), 736 (Mabilangan). Mabilangan did not receive any text messages from the Petitioner herself. Tr. at 723.

Walsh also testified that at about 4:45 p.m., after the polls closed, he sent a text message to "a lot" of employees stating that the Union had won the election and that there would be a party at a nearby restaurant. Tr. at 1107-08. Michelle Moore, an LPN employed by the Employer, testified that on the day of the election she received a message stating the Union had won. She testified that she saw it after 5 p.m. and did not know what time it had come through on her phone. Tr. at 677.

Beatrice Beauvior, a CNA, testified that on the day of the election, she received a text message from the Union at about 10 a.m. while the polls were open, stating that the Union had won. Tr. at 633. Beauvior testified that this message was sent to a group of employees, but when asked how she knew that, she admitted that she did not actually know whether other employees had received the same text. Tr. at 636. Walsh denied that he sent a message stating that the Union had won the election to any voter prior to 4:45 p.m. Tr. at 1108. Beauvior also

testified that on the day before the election, she received a call from a man who identified himself as being from the Union who asked Beauvior if she was voting and if she supported the Union. Tr. at 632-33, 646.

Jean Venette, another Union agent, testified that he called about seven employees on the day of the election to remind them to vote. Tr. at 745. Walsh asked Venette to call these employees. Tr. at 746. Venette called these employees between 11 a.m. and 1 p.m. from the Union's office. Tr. at 746, 756. Venette testified that the employees he called were scheduled to work in the evening and had indicated to Union agents that they would vote in the afternoon session, and so the Petitioner assumed that they had not voted during the morning session. Venette stated that he did not actually know whether the people he called had voted when he called them. Tr. at 748-49, 754. He spoke to one employee and left messages for the other six employees reminding the employees to vote. Tr. at 749, 753. Venette testified that he did not send text messages to employees.

Tracey Thomas testified that she received a call from a Union agent who identified himself as Jean on the day of the election. She testified that she received this call between 1 and 2 p.m. Tr. at 815. At the time, Thomas was in her car, driving to work. Tr. at 1085. According to Thomas, Jean told her that he was reminding her to go and vote because it was very important and it looked like the Union was winning. Tr. at 815.

Venette testified that he left a slightly different message for Keisha Rice. Venette called Rice and left her the following message: "I'm just calling to remind you about the vote this afternoon cause you missed the one earlier this morning and it's very important. I mean right now we're looking good, but we still need more votes." Venette also offered to pick Rice up from work and drop her off. Er. Exs. 15 and 16. According to Venette, Rice has a full-time job

at a hospital, and had previously told Venette that she was going to vote in the morning on her way to the hospital. When Walsh asked Venette to call Rice, Venette assumed that she had not voted in the morning as they had discussed, but he did not know whether she had actually voted when he called her. Tr. at 753-54.

Rice works for the Employer part-time, and works another job at a hospital. Tr. at 831, 837. At the time of the election, she worked at the Employer's facility on Mondays, Wednesdays, Fridays, Saturdays, and Sundays. Tr. at 837. She worked at her full-time hospital job from 8 a.m. to 3:30 p.m. Monday through Friday. Tr. at 838. The election was held on a Thursday. Rice testified that she received three calls from the Union. She listened to one message, the message from Venette discussed above, at about noon on the day of the election while she was at her hospital job. Tr. at 833. Rice specifically denied that she had ever spoke to Venette at all or that she had ever told anyone what time she planned to vote. Tr. at 833, 842.

Rice testified that she voted in the afternoon session on the day of the election. Tr. at 831. As discussed more fully below, the conference room was set up differently during the morning and afternoon sessions. In the morning the voting booth was situated on a counter in the conference room. During the afternoon session, the voting booth was placed on a conference table that had been brought into the room for that session. Despite her testimony that she had voted in the afternoon, when asked to describe the voting room, Rice testified that the voting booth was on a counter on the left side of the conference room. Tr. at 836. When shown photographs of the conference room as it was set up during the morning session (Er. Ex. 8A) and during the afternoon session (Er. Ex. 9A), Rice identified the photograph of the morning set up as the way the conference room looked when she voted. Tr. at 847.

Fanny Mora testified that at 2:15 p.m. on the day of the election, she received a call from a woman who identified herself as calling from the Union. Tr. at 967. The woman did not give Mora her name. Tr. at 1158, 1168-70. The woman asked if she had voted. Mora said that she had already voted. Tr. 967. The caller did not ask Mora how she had voted. Tr. at 1158.

Telephone and Text Records

At the hearing, the Employer introduced cell phone records it had received from Verizon for the cell phones of Brian Walsh, Jean Venette, Jillian Jacques, and Shannon Napolitano.¹¹ The records show calls placed to and from the cell phones of these individuals from 5:45 a.m. (when the morning session was to start) to 4 p.m. (when the afternoon session ended), including the numbers called by or calling those cell phones. In addition, the records indicate what time text messages were sent from or received by those cell phones, as well as the number texting to or being texted from those phones. The records do not indicate the content of any text messages, or when or if any text messages were accessed.

The records indicate that Walsh sent text messages to and received text messages from a number voters throughout the day. Er. Ex. 19. Walsh sent text messages to about six employees at 6:45 a.m. on the day of the election. Walsh sent a text message to eight employees at 11:20 a.m. on the day of the election, including Beatrice Beauvior. Walsh sent text messages to nine

¹¹ The Employer introduced two copies of these records. One copy, Employer Exhibit 18, is a clean copy of the records. A second copy, Employer Exhibit 19, was annotated by Doreen Illis. On this copy, Illis identified the employees whose phone numbers appear on the records based on the contact information the Employer has for these employees and the telephone numbers which appear on the Petitioner's release forms, entered into evidence as Employer's Exhibit 2. Tr. at 994-97. The Petitioner did not challenge the accuracy of the annotations, and I have relied on them in my examination of these records.

The Petitioner objected to the introduction of these records on the grounds that Verizon produced these records directly to the Employer without obtaining a release from or even notifying the individuals that their cell phone records were being produced pursuant to a subpoena. Tr. at 988. While the production of these records may raise privacy concerns, especially for the two individual employees, I admitted these exhibits as relevant evidence. As noted during the hearing, the Petitioner's concern was that the Employer had seen these records at all. Tr. at 1043-44. Excluding this relevant evidence from the record would not remedy that concern.

employees at 2:45 p.m. on the day of the election, including Thomas and Pratts. The records further show that Walsh sent a number of other text messages to various employees throughout the day. In addition, Walsh was in contact with employees by cell phone throughout the day. Er. Ex. 19. There is no evidence in the record regarding the content of any of these calls.

The Verizon records indicate that Venette sent a text message to one employee at 6 a.m. His cell phone records indicated that he exchanged a number of calls with that same employee between 6 a.m. and 7 a.m. In addition, his cell phone records indicate that he called Keisha Rice three times on the day of the election, between the polling sessions. In addition, Venette called one other employee in the afternoon. Er. Ex. 19.

Credibility

Turing to credibility, after observing the demeanor and listening carefully to the testimony of these witnesses, I make the following findings.

I generally credit the testimony of Walsh, Venette, Thomas, Pratts, Mabilangan, Moore, and Mora. Their testimony was straightforward and consistent. There is no dispute that Walsh texted voters to remind them to vote while the afternoon polls were open. It is also uncontroverted that Walsh texted employees after the polls closed to tell them that the Union had won the election. While Verizon's records indicate that Walsh texted small groups of employees at approximately 6:45 a.m. and again at approximately 11:20 a.m. I credit Walsh's testimony that he did not text any voters a message stating that the Union had won the election before 4:45 p.m. I credit Walsh and Venette's testimony that they did not know whether employees had voted or where voters were when they called or sent text messages to those employees.

With regard to the testimony of Beauvior, who testified that she received a text at 10 a.m. while the polls were open stating that the Union had won, I do not find this testimony reliable. It

is uncontroverted that the polls were not open at 10 a.m. Beauvior did not specify who had sent the text from the Union or how she knew it was from the Union. She testified that other people had received the same text, but admitted that she did not actually know whether other employees had received the same text. The Verizon records show that Walsh texted Beauvior at 11:20 a.m. I find Walsh's testimony that he did not send a text stating that the Union had won before the polls close to be credible.

There is also no dispute that Venette called employees to remind them to vote, as Venette and Thomas testified. With regard to Venette's call to Rice, I credit Venette's testimony about the circumstances surrounding that call. With regard to Rice's testimony, I do not find her testimony credible. Rice denied that she ever spoke to Venette and had not told anyone she planned to vote in the morning session. This testimony is contradicted by Venette's account, which I find credible. More significantly, Rice's testimony that she voted in the afternoon is simply not believable. Although Rice testified that she voted in the afternoon, she clearly described the voting room as it was arranged during the morning session. She could only have seen that configuration of the room if she had been there in the morning, which bolsters Venette's testimony.

Discussion

The record evidence does not support the Employer's allegation that the Petitioner engaged in objectionable conduct by sending text messages to and calling voters on the day of the election.

Electioneering

As discussed above, Milchem prohibits electioneering in the final moments before a voter votes. See Milchem, Pepsi-Cola Bottling Company, *supra*. There is no evidence that any employee received a call or text message from the Petitioner in the final moments before they voted.

The record evidence establishes that on the day of the election, Walsh sent text messages to six employees at 6:44 and 6:45 a.m., and to eight employees at 11:20 a.m., however there is no evidence in the record as to the content of those messages. Walsh sent a text message to nine employees at 2:45 p.m. reminding employees to go vote for the Petitioner, that the election ended at 4 p.m., and telling employees that the Petitioner was winning. Walsh did not know whether the employees had voted when he sent them text messages. In fact, the three employees who testified to having seen this message on the day of the election had voted before they read the text. Tr. at 818 (Thomas), 706 (Pratts), 724, 736 (Mabilangan). Walsh also called a number of employees throughout the day. There is no evidence that Walsh called any voter who was waiting to vote.

The record establishes that Jean Venette also called approximately seven employees on the day of the election to remind them to vote. Again, Venette spoke to only one employee, Thomas, who was not at the Employer's facility when she spoke to Venette. Venette left voice mails for the other employees he called. Keisha Rice, the only employee who testified about receiving a voicemail from Venette, listened to his voice message at about noon on the day of the election while at another job. There is no evidence that any voters listened to voice messages from Venette in the final moments before they voted.

The Employer argues that the “barrage of phone calls and text messages to employees while they were at work on the day of the election” violates Peerless Plywood, 107 NLRB 427 (1953), which prohibits parties from “making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election.” Peerless Plywood, 107 NLRB at 429. This prohibition does not apply to the distribution of campaign literature or “any other legitimate campaign propaganda or media.” Peerless Plywood at 430. In this case, the Employer has not established that any message was sent to a massed assembly of employees at any point. The only evidence that employees were together when receiving a message from the Union on the day of the election was that Pratts and Mabilangan were together when Pratts received a text message from Walsh. Mabilangan did not receive a message herself. Some employees, including Thomas and Rice, were not even at work when they received a call or text from the Petitioner. Tr. at 818, 1085 (Thomas), 833 (Rice).

This case is akin to Virginia Concrete Corp., 338 NLRB 1182 (2003). In that case, the employer sent a text message to unit drivers on mobile devices installed on the dashboards of the trucks. The message, which was sent within 24 hours of the election, told drivers to vote no. The Board found that sending such a message did not violate Peerless Plywood because the text message was analogous to permissible campaign literature. Moreover, the Board found that employees could delete the message or scroll past it and were not required to leave it on the screen of their mobile devices. This is precisely the nature of the text messages and the phone calls and voicemails sent by the Petitioner on the day of the election.

With regard to the Employer’s allegation that the Petitioner engaged in improper electioneering by telling employees the Petitioner knew how they had voted or by stating that the Petitioner was winning the election, I find these allegations are without merit. With the

exception of Venette's message to Rice, there is no evidence that Walsh or Venette indicated in a message that they knew whether an employee had already voted. In fact, both Walsh and Venette credibly testified that they did not know whether employees had already voted when they contacted them. With regard to Venette's call to Rice, Venette credibly testified that he believed Rice would have already voted based on their prior conversations.

With regard to Walsh and Venette's representations that the Petitioner was winning the election, Walsh explained that this representation was made based on the Petitioner's polling of employee support before the election. If not accurate, this statement would constitute a misrepresentation of the support for the Petitioner, allowable under Midland National, *supra*.

In summary, there is no evidence that the Petitioner engaged in any objectionable electioneering by calling or sending text messages to employees on the day of the election. There is no evidence that the Petitioner contacted any employees who were waiting to vote, violated Peerless Plywood by contacting a massed assembly of employees within 24 hours of the election, or made statements about who had voted or the outcome of the election.

Polling

It is well settled that unions may inquire about employee support. See J.C. Penney Food Dept., 195 NLRB 921, 921 fnt. 4 (1972). In this case, Beatrice Beauvior received a call from an unidentified Union agent the day before the election asking if she supported the Union. Fanny Mora received a call from an unidentified Union agent at 2:15 p.m. on the day of the election, after she voted, asking if she had voted. There is no evidence that the Petitioner engaged in objectionable conduct during these calls.

For the foregoing reasons, I recommend overruling the Employer's fourth and twelfth objections.

Objections Nos. 5, 6, and 11

In its fifth objection, the Employer alleges that during the critical period prior to the election, including the day of the election while the polls were open, the Petitioner engaged in surveillance of the voting process, voter participation, and voter actions during and between the voting periods. In its sixth objection, the Employer alleges that during the critical period prior to the election, including the day of the election while the polls were open and between the voting periods, the Petitioner created the impression of surveillance in and around the voting area. In its eleventh objection, the Employer alleges that during the critical period prior to the election, including the day of the election while the polls were open, the Petitioner kept track of or made a record of which employees had voted and how they had voted.

Facts

With regard to these objections, the Employer contends that the Petitioner's observer kept a list of voters who had voted. The Employer further alleges that the Petitioner created an impression of surveillance by reminding voters to vote and stating that the Union was winning the election, thus suggesting that the Petitioner knew who had voted and how they had voted.

Shannon Napolitano served as the Petitioner's observer in the conference room.¹² Tr. at 315. Napolitano testified that during the pre-election conference, the Board Agent gave her instructions, including that she was not allowed to use her cell phone. Napolitano testified that she had her cell phone with her during the election, but kept it in her purse.

Napolitano stated that she never kept a list of people who had voted, although she could recall some of the people who voted. Tr. at 350-51. Jacques, the Petitioner's roving observer,

¹² Napolitano was terminated between the election and the hearing. At the time of the hearing, she was employed by the Petitioner. Tr. at 315.

similarly testified that she never kept a list or any kind of record regarding who had voted or how anyone voted. Jacques had no knowledge of anyone keeping such a list. Tr. at 424-25.

Brain Walsh testified that after the first voting session, he spoke to Napolitano. According to Walsh, Napolitano told him that the Petitioner's supporters were going to the polls. Walsh asked her if she could remember any of the supporters who voted and Napolitano stated that she could remember some of them. Tr. at 108-09. She did not give Walsh specific names or state how any voter might have voted. Tr. at 107. According to Walsh, neither Napolitano or Jacques wrote down the names or made any other record of voters who voted. Tr. at 108-09. Ricky Elliott and Jean Venette similarly testified that neither of the Petitioner's observers told them who had voted during the morning session. Tr. at 277 (Elliott); 757 (Venette). Venette also stated that he had never seen a list of people who had voted and had no knowledge of such a list existing. Tr. at 757.

Sheena Orozco, a payroll benefit coordinator¹³ who served as the Employer's observer in the conference room during the election, testified that Napolitano did have her cell phone out during the election. Tr. at 444, 482. According to Orozco, there was no clock in the conference room, so they used Napolitano's cell phone for the time. She further testified that Napolitano was looking at her cell phone and touching her cell phone while employees were voting. Tr. at 483. Orozco further testified that at the end of the first session, Napolitano looked at the Excelsior list,¹⁴ ran her finger down the list, and commented that there were a certain number of voters left to vote. The Board Agent told Napolitano not to do that. Tr. at 485-86. Napolitano complied. Tr. at 487. Napolitano denied that she ever "ran her finger down" the Excelsior list. Tr. at 351.

¹³ At the time of the election, Orozco was a receptionist. She was subsequently promoted. Tr. at 444, 554.

¹⁴ Excelsior Underwear Inc., 156 NLRB 1236 (1966).

Brian Walsh also testified that at the end of the election, after the polls had closed, Napolitano said that everyone had voted except for five people. The Board Agent told Napolitano not to say that. Tr. at 1109-10.

Several employees testified that they saw Napolitano with her cell phone during the election. Crystal Pratts testified that when she voted, she saw a cell phone on the conference table closest to Napolitano, so she assumed it was Napolitano's. Tr. at 710. Elaine Mabilangan also testified that she saw a cell phone on the table in front of Napolitano when she voted. Tr. at 730. Tracey Thomas testified that when she voted, Napolitano was holding her cell phone and "manipulating it." Tr. at 816. Eric Carpio also saw Napolitano holding her cell phone, but he did not know what she was doing with the cell phone. Tr. at 768. Doreen Dande testified that she saw Napolitano "flipping" her phone. Dande stated that it looked like Napolitano was texting, but admitted that she did not know what Napolitano was doing with her phone. Tr. at 568, 582-83. None of these witnesses, including Orozco, testified that Napolitano was in any way keeping track of who had voted, how anyone had voted, or that they suspected Napolitano was keeping such a list.

The Verizon records indicate that Napolitano did not send any text messages while the polls were open on the day of the election. She received one text message from another employee after the afternoon polls opened. Between the polling times, Napolitano did exchange text messages with a handful of employees, including Jillian Jacques. She sent one message to Brian Walsh at approximately 1:30 p.m. Er. Ex. 19. There is no evidence regarding the content of any of these messages.

Credibility

After observing the demeanor and listening carefully to the testimony of these witnesses, I generally credit their testimony regarding these objections with the exception of Shannon Napolitano. I note that with the exception of Napolitano's account, the testimony on these facts is uncontested. Walsh, Venette, Elliott, and Jacques all testified that they did not keep any list of voters, in writing or electronically, or have any knowledge that anyone else keep such a record. This testimony is completely un rebutted.

I credit Orozco's testimony that Napolitano had her cell phone out and with her during the election. This testimony is corroborated by several employees, including Pratts, Mabilangan, Thomas, Carpio, and Dande, who saw Napolitano's cell phone during the election. Many of these employees testified with specificity about whether they saw Napolitano holding her phone or whether it was sitting on the table. Moreover, I credit Orozco's testimony that Napolitano reviewed the Excelsior list to see how many people had voted. This testimony is corroborated by Walsh, who testified that Napolitano commented that there were only five people who did not vote at the end of the election.

With regard to Napolitano's testimony, I do not credit her testimony that she did not have her cell phone out during the election or that she did not look at the Excelsior list to determine how many people had voted. I do credit Napolitano's testimony that she did not keep any list or record of who had voted or how voters had voted. This testimony is corroborated by Walsh. According to Walsh, they discussed whether the Petitioner's supporters were voting and Napolitano recalled some of the supporters who voted, but not all. In addition, Elliott, Venette, and Jacques testified that they had no knowledge of anyone maintaining a list of voters. In the

absence of any evidence rebutting Napolitano's testimony, and in view of the corroborating testimony of other witnesses, especially Walsh, I must credit this testimony.

Discussion

It is well settled that it is objectionable for a party to maintain a list of individuals who have voted other than the official Excelsior list. The Board has held: "The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. And this is so even when there has been no showing of actual interference with the voters' free choice." Days Inn Management Co., 299 NLRB 735, 737 (1992); see also Cross Pointe Paper Corp., 330 NLRB 658, 662 (2000); Masonic Homes of California, 258 NLRB 41 (1981); Piggly Wiggly # 011, 168 NLRB 792 (1967). The record evidence does not support such a finding in this case.

The record evidence failed to establish that the Petitioner maintained a list of those individuals who had voted or how they voted. The Employer did not produce any evidence to support its contention that such a list, written or electronic, existed. Both the Petitioner's observers testified that they did not keep such a list. All the Petitioner's organizers, Walsh, Elliott, and Venette credibly testified that they had never seen or had any knowledge that such a list existed. The Employer presented no evidence to rebut any of this testimony.

In addition, there is no evidence that employees believed or even suspected the Petitioner was keeping such a list. While three employees saw Napolitano holding her cell phone during the election, none of these employees could state what Napolitano was doing with her phone, or that they believed she was keeping a list of names. Significantly, Orozco, who sat next to Napolitano during the entire election, stated only that they were using Napolitano's phone for the

clock. She provided no evidence that Napolitano was keeping track of voters' names. This evidence would not support an inference that employees believed their voting activities were being surveilled.

The Employer argues that it met its burden with regard to these objections based on Walsh's testimony that Napolitano told him that some of the Petitioner's supporters voted. Walsh testified that after the morning session, Napolitano told Walsh that the Petitioner's supporters were voting. This evidence does not establish that Napolitano or Walsh maintained a list of voters. Moreover, there is absolutely no evidence that any employees knew of this exchange. In these cases, the Board will set aside an election "only if it can be shown or inferred from the circumstances that employees were aware that their names were recorded." Indek Energy Services of Turners Falls, Inc., 316 NLRB 300, 301 (1995) (citing Southland Containers, 312 NLRB 1078 (1993)). The Employer cannot rely on this exchange to support its objection.

The Employer also argues that because Napolitano took note of how many people had voted, it had met its burden that the Petition had engaged in objectionable conduct. However, it is not objectionable for an observer to review the official list. In NLRB v. WFMT, 997 F.2d 269 (7th Cir. 1993), an observer reviewed the official Excelsior list during an election, and commented on which employees had not voted. The Board found that this conduct was not objectionable where the observer did not keep a separate list of voters and there was no evidence that the observer's comments influenced the votes of any employees. WFMT, 997 F.2d at 277. In this case, similarly, there is no evidence that employees knew of Napolitano's comments regarding the number of employees who had not voted or that her comment had any effect of the election.

The Employer also relies on the text message Walsh sent to voters reminding them to vote stating “we are winning,” which was discussed above in connection with Objections Nos. 4 and 12, to support its position that the Petitioner created an impression of surveillance. However, as discussed above, Walsh credibly testified that he based this representation on the Petitioner’s own polling prior to the election and not on any information about the actual election. There is no evidence that employees believed their votes were being surveilled as a result of this message. In fact, Walsh sent these reminders to vote to employees who had already voted, suggesting that the Petitioner did not know who had voted.

The Employer has not established that the Petitioner kept a list of voters, engaged in surveillance or created the impression of surveillance on the day of the election. Accordingly, I recommend overruling the Employer’s fifth, sixth, and eleventh objections.

Objection No. 7

In its seventh objection, the Employer alleges that on the day of the election, the Board Agent conducting the election failed to maintain the secrecy of the voting process based on the arrangement and the condition of the voting area, and that the Board Agent’s conduct was otherwise objectionable, including but not limited to allowing the Petitioner’s observer to violate the NLRB’s rules for election observers. Given amount of testimony regarding this objection, I examine the allegations in three sections, including the late opening of the polls, the conduct in the election room during the election, and the secrecy of the voting booth.

A. Late Opening of the Polls

Facts

There is no dispute that the polls opened late for the morning session of the election. That session was scheduled to run from 5:45 a.m. to 6:45 a.m. The Board Agent did not arrive until approximately 5:45 a.m. Tr. at 88 (Walsh); 317 (Napolitano); 374 (Jacques); 446 (Orozco). The polls opened at approximately 5:55 a.m. Tr. at 88 (Walsh); 201 (Illis); 287 (Elliott); 446 (Orozco). Because the polls opened late, the parties agreed to extend the voting time so that the length of the first voting session was still one hour. Tr. at 112 (Walsh); 247 (Illis); 299 (Elliott).

There was no evidence offered that any voters were waiting to vote before the polls opened or were in any way unable to vote because of the delay in opening the polls. Napolitano testified that she did not recall seeing anyone waiting to vote before the polls opened in the morning. Tr. at 364. The Employer offered no evidence to rebut this testimony.

The Petitioner called Jeremias Santos, whose name appears on the Excelsior list. Er. Ex. 11. Santos testified that he did not vote in the election because he had been out of the country and was traveling home on the day of the election. He arrived in New Jersey at approximately 7 p.m., after the polls closed. Tr. at 1219-1220. The Petitioner relies on this evidence to show that the late opening of the polls could not have affected the outcome of the election because given that Santos would not have voted in any event, the number of non-voters was non-determinative.

The Employer argues that due to arriving late, the Board Agent did not have time to set up properly for the election, such as having adequate time to prepare the “time to vote” signs for the roving observers or to arrange the voting room properly. There is no dispute that the Board Agent and the parties made the signs for the roving observers during the pre-election conference.

Tr. at 292 (Elliott), 321-23 (Napolitano), 448-49 (Orozco). With regard to the arrangement of the voting room, Orozco testified that during the pre-election conference, the Board Agent originally set up the voting booth on a conference table in the room. Tr. at 453. The Board Agent and observers were also going to sit at this table during the election. After some general discussion, the Board Agent moved the voting booth to a counter in the room across from the conference table because “everyone” thought the booth was too close to the observers. Tr. at 455. According to Orozco, after the Board Agent moved the booth to the counter, Union agent Ricky Elliott commented that it would be difficult for the employees to vote behind the booth as it was originally positioned, so the Board Agent repositioned the voting booth. Tr. at 457. Elliott testified that he had commented on the position of the booth on the counter, but he did not know whether the Board Agent moved the voting booth as a result. Tr. at 282. Illis and Walsh both testified that Board Agent asked if anyone objected to the set up of the voting booth on the counter and neither party objected. Tr. at 116 (Walsh), 246-47 (Illis).

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of these witnesses, I generally credit the testimony of these witnesses regarding the late opening of the polls and the pre-election conference. The witnesses testified in a clear and straightforward manner and the testimony on these points is not contested. I further credit the testimony of Santos that he was unable to vote in the election due to his personal travel plans.

Discussion

It is well settled that the Board will not set aside an election based only on a showing that the polls did not open on time or were not opened for the entire voting session as scheduled. An election may be overturned if the polls open late and one of three additional factors is present:

(1) where the votes of those employees “possibly excluded” by the defect could have been determinative; (2) where there are “accompanying circumstances that suggested that the vote may have been affected”; or (3) where “it was impossible to determine whether such irregularity affected the outcome of the election.” Midwest Canvas Corp., 326 NLRB 58 (1998), see also Wolverine Dispatch, Inc., 321 NLRB 796 (1996); Celotex Corp., 266 NLRB 802, 803 (1983); Jobbers Meat Packaging Co., 252 NLRB 41 (1980). In this case, there is no evidence that any voters were disenfranchised by the late opening of the polls at the morning session. In fact, the Employer does not contend that employees were disenfranchised. Tr. at 1363. A review of the tally of ballots indicates that the number of non-voters would not be determinative, especially given that one voter, Santos, could not have voted in the election.¹⁵ See Environmental Maintenance Solutions, Inc., 355 NLRB No. 58 at fn. 3 (2010) (in which the Board overruled an objection alleging late opening of the polls where the number of unopened challenged ballots and nonvoters was non-determinative).

The Employer concedes that voters were not disenfranchised, but maintains that the late opening of the polls was objectionable because the Board Agent did not have adequate time to set up the voting room. The Employer specifically argues that the Board Agent had “barely enough time to make up signs for the [roving] observers.”¹⁶ Tr. at 1363; 1286-87. However, the record establishes that these signs were prepared during the pre-election conference. Moreover, I note that, as discussed above in connection with Objections Nos. 3 and 13, the agreement of the

¹⁵ See Monte Vista Disposal Co., 307 NLRB 531, 533 (1992) (in which the Board decided not to count the ballots of employees who arrived after the polling time absent extraordinary circumstances). The tally of ballots as reported in the Regional Director’s Report and Notice of Hearing indicates that there were approximately sixty eligible voters. However, the Excelsior list contains 73 names. Er. Ex. 11 (not including the two names the parties agreed to delete at the election. Tr. at 213-14). There were five challenges. Even assuming all five challenges were individuals who were not on the Excelsior list, the number of non-voters would remain non-determinative.

¹⁶ It is uncontroverted that the Board Agent did not arrive with “time to vote” signs for the roving observers. Tr. at 376.

parties to have “roving observers” who would hold “time to vote” signs was a side agreement between the parties which the Region declined to incorporate into the Stipulated Election Agreement. Jt. Ex. 2, Tr. at 1228. The Employer has made no showing that it was incumbent on the Board Agent to prepare such signs for the parties during the pre-election conference.

In addition, the Employer argues that the Board Agent did not have time to arrange the polling room properly for the morning session. This argument is not supported by the record evidence. According to a number of witnesses, there was substantial discussion about the set up of the booth during the morning session. Orozco testified that the booth was originally placed on the conference table, but was moved after “everyone” agreed that it would be too close to the observers. Orozco and Elliott testified that Elliott commented on the set up of the booth on the counter. According to Orozco, the Board Agent moved the booth to accommodate Elliott’s concerns. Illis and Walsh both confirmed that the Board Agent asked if the parties agreed with the set up of the booth and no one objected.

The record evidence establishes that the Board Agent and the parties had ample opportunity to prepare for the election. The Board Agent had time to make signs for the roving observers and arrange the election room to the satisfaction of both parties. There is no evidence that the Board Agent’s late arrival or the late opening of the polls affected the election.¹⁷

¹⁷ During the hearing, Eric Carpio testified that he tried to vote at 6:45 a.m., but the Board Agent would not let him vote because the polls were closed. Tr. at 762. This allegation was not included in the Employer’s objections. Before the hearing, Carpio had given a statement to the Employer’s attorneys in which he stated that he tried to vote at 6:55 a.m. and was told the polls were closed. Tr. at 773, 775. More importantly, there is considerable evidence in the record that the polls were opened at 6:45 a.m. Neither Orozco or Napolitano testified that anyone had been prohibited from voting while the polls were open. Based on the record evidence, I do not credit Carpio’s testimony that he was not allowed to vote at 6:45 a.m. If he appeared at 6:55 after the polls had closed, the Board Agent could have allowed him to vote subject to challenge. See National Labor Relation Board’s Casehandling Manual, Sec. 11324.1. In this case, Carpio was able to vote during the afternoon session, and in fact, voted without challenge. Tr. at 765. The Board Agent’s alleged decision not to allow him to vote in the morning, if true, could not have affected the election results.

B. Conduct During Election

Facts

The Employer alleges that the Board Agent failed to conduct the election in an orderly manner. The Employer alleges that the polling place was too noisy, that employees were allowed to dance in the polling place, and that the Board Agent put on make up and nail polish during the election and allowed the Union's observer to use her cell phone during the election.

Napolitano

Napolitano testified that prior to the election, the Board Agent told her that as an observer, she could not have cell phone on during the election. Tr. at 318, 324. A number of employees testified that they saw Napolitano with her cell phone during the election, but did not hear the Board Agent tell her not to use her phone. Tr. at 569 (Dande); 769 (Carpio); 816 (Thomas). The Verizon records show that Napolitano did not make any calls or send any text messages while the polls were opened. Er. Ex. 18.

According to Napolitano, it was sometimes loud inside the voting room and there were times that she could hear conversations in the hallway outside the polling place, although she could not hear specifically what was said in the hall. Tr. at . Tr. at 349-50, 363. Napolitano offered no details about the noise or any conversations that occurred in the conference room or outside in the corridor. Napolitano testified that the greatest number of people waiting to vote at any one time was three. Tr. at 349. The longest anyone waited to vote was about five minutes.¹⁸ Tr. at 366.

¹⁸ Napolitano stated that the Board Agent said that at the end of the first session, the Board Agent said that she did not want the second session to happen like the first session because she wanted people to wait outside the polling room during the second session. Tr. at 347, 362. I do not rely on this hearsay testimony.

Napolitano testified that one voter, Beatrice, danced in the polling place, spinning around twice and waving her arms as she walked out of the polling room. Tr. at 348, 362-63. Napolitano further testified that the Board Agent cleaned her lipstick and put on nail polish while the polls were opened. No voters were present when this occurred. Tr. at 348, 362.

Orozco

According to Orozco, the Board Agent gave the observers a copy of the "Instructions to Observers" form, but did not go over any of the specific points with the observers. Tr. at 450-51. Orozco stated that she understood that she could not bring a cell phone to the election from the "Instructions to Observers." Tr. at 515. Orozco testified that Napolitano was using her phone as a clock since there was no clock in the polling room. Tr. at 483.

Orozco also testified that it was loud inside and outside the voting room. Tr. at 479-81. She testified that employees waiting to vote were talking, laughing, and being disruptive while people were voting. Tr. at 550. Orozco could not identify any employees who were laughing or disruptive, or state how many times the disruptive behavior occurred. Tr. at 550-51. She admitted that no one was prevented from voting because of the conduct in the polling room. Tr. at 551. Orozco also testified that the greatest number of employees waiting to vote during the morning session was three. Tr. at 479-80. Orozco testified that she remembered one employee jumping when she was putting her ballot in the ballot box. Tr. at 549.

Orozco also testified that at one point, the Board Agent asked if a voter had put the ballot in the ballot box because the Board Agent did not see her do so. Orozco told the Board Agent that the voter had put the ballot in the box. Tr. at 478.

Other Employees

Doreen Dande testified that when she voted, the Board Agent, Napolitano, and another employee were discussing a challenge to the employee's vote. Another employee in the polling room was speaking to someone else in the corridor. Tr. at 569-70. Dande testified that while she was voting, she heard someone outside the room say "time to vote" and "ten minutes to vote," which she characterized as campaign slogans. Elaine Mabilangan testified that when she voted, there were people outside the voting room waiting to vote who were "laughing out loud, talking to each other loudly." Tr. at 729. She did not hear what anyone said specifically because she was not paying attention to the people outside. Tr. at 738.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of these witnesses, I generally credit the testimony of Napolitano, Orozco, Dande, and Mabilangan with regard to the conduct in the conference room during the election. Their testimony is consistent and without rebuttal. With regard to Doreen Dande's testimony, while I credit her testimony that people were talking as she was voting, I do not credit her testimony that she heard "ten minutes to vote" as she was voting. As explained above, Dande voted at 6 a.m., well before the polls closed. I do not find it believable that she heard anyone saying that there were ten minutes to vote at 6 a.m.

Discussion

The Board recognizes that absolute compliance with the Board's election procedures is not required for a valid election. "The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and the validity of the election."

Polymers, Inc., 174 NLRB 282, 282 (1969). The Board will examine all the facts to determine whether “there has been a breach of security in an election, or a reasonable possibility of such a breach.” Id. at 283.

The Employer alleges that the Board Agent was delinquent in failing to prohibit Napolitano from using her cell phone. However, both observers testified that they had been instructed not to use their cell phones. Various witnesses testified that they saw Napolitano with her cell phone, but none of these witnesses could verify what Napolitano was doing with her telephone. Significantly, Orozco, who had the best opportunity to observe Napolitano, testified only that Napolitano was using her phone as a clock since there was no clock in the polling room. Moreover, the record establishes that Napolitano did not make calls or send texts from her phone during the voting.

With regard to the Employer’s claims that the noise level in the polling room was overly loud, there is no prohibition against employees speaking to each other while waiting to vote or in or around the polling place. See Dumas Brothers Mfg., 205 NLRB 919, 928 (1973) (finding that there “never has been a rule requiring absolute silence among voters waiting to vote.”); see also Masoneilan International, Inc., 223 NLRB 965 (1976). In this case, the evidence establishes that at various times during the polling, employees were talking while waiting to vote in the conference room or outside in the hallway. While a handful of employees testified that it was “loud” in the polling place, none of these witnesses offered any details or specifics about the noise level that would suggest that the election was affected by these discussions. In fact, to the contrary, Orozco, who could not provide any specific information or examples of “disruptive” behavior, conceded that no one was prevented from voting by any of these conversations.¹⁹ The

¹⁹ The Employer also contends that Elaine Mabilangan testified that she felt rushed when voting because of the “circus-like atmosphere” in the voting room. This contention mischaracterizes Mabilangan’s testimony, which

only witness to offer specifics about any conversations taking place was Dande, who testified that the Board Agent, Napolitano, and a voter were discussing a challenge to a ballot, a necessary exchange during the conduct of any election. The record does not reflect that the election was in any way affected by conversations in or around the election room.

The Employer further argues that the Board Agent also allowed employees to dance in the voting room. As explained by the observers, one voter twirled twice while another voter jumped. There is no evidence that either of these two incidents were witnessed by other voters, or in any way affected the election.

The Employer asserts that the Board Agent was inattentive during the polling in that she was putting on nail polish and lipstick. Napolitano testified without rebuttal that the Board Agent cleaned her lipstick and put on nail polish at a time when no voters were present. The Board Agent's actions during a lull in the voting does not suggest that she was inattentive to the election, or otherwise establish objectionable conduct. See Environmental Maintenance Solutions, Inc., supra (finding that it was not objectionable for Board Agent to take smoking breaks outside of the polling place during lull in the voting). The Employer further asserts that the Board Agent was inattentive because she asked the observers if a particular voter put her ballot in the ballot box. Orozco informed the Board Agent that the voter had put her ballot in the box. This testimony does not establish that the Board Agent was not paying attention to the polling. In fact, to the contrary, the Board Agent asked the observers to verify that a voter had properly cast a ballot when the Board Agent did not see for herself, suggesting that she was

was that she felt rushed because there were other employees waiting to vote. Tr. at 727 ("I was kind of rushed because there was already another employee standing to go to that private voting section."). She further testified that there were other employees outside the voting room who were "excited to go in." Id. Her testimony does not establish that the atmosphere in the voting room was inappropriate or in any way influenced her vote. In fact, she stated that she was not paying attention to the employees outside the voting room. Tr. at 738.

paying attention. Based on this record, I do not find that the Board Agent's conduct "raises a reasonable doubt as to the fairness and validity of election."²⁰ Polymers, Inc., 174 NLRB at 282.

C. The Voting Booth

The true crux of this objection is that the Board Agent failed to preserve the secrecy of the ballots in the voting booth.

Facts

The Set Up of the Conference Room

Doreen Illis and Sheena Orozco both described the conference room used for the election and how it was arranged on the day of the election. Employer's Exhibit 7 is a series of pictures of the conference room from various vantage points. The door of the room faces windows on the opposite wall. Er. Ex. 7B. On the wall to the left of the doorway there is a counter which is six to eight feet long, running from about midway down the length of the room to the end of the room where there are windows. Tr. at 192 (Illis). This counter is visible in Employer's Exhibits 7D, 7E, and 7F. The counter is 36 inches high and 18 inches deep. Tr. at 183 (Illis), 470 (Orozco); Er. Ex. 13.²¹ The 18 inches of the counter closest to the windows are about 10 inches higher than the rest of the counter, creating a small raised shelf at the end of the counter. Tr. at 193, 209 (Illis), 473 (Orozco); Er. Ex. 13. There was considerable testimony about whether there

²⁰ In its closing, the Employer asserted that the Board Agent left ballots on the table for voters to pick up and thus "there is no way to determine whether one of the voters might have picked up more than one ballot and thereby been able to cast more than one vote." Tr. at 1298. The Employer had not raised this allegation previously during the hearing. The record does not support the Employer's contention. Tracey Thomas testified that after she gave her name to the observers, she "grabbed her ballot" from the table and voted. She did not remember anyone handing her a ballot. Tr. at 1087. This testimony is uncorroborated, as no other witness testified that ballots were on a table. Significantly, Orozco, who was in the polling room for the entire election, testified that the Board Agent handed employees their ballots. Tr. at 548. Because this testimony is uncorroborated and is rebutted by the Employer's observer, I do not credit Thomas's assertion. Moreover, it is entirely possible to determine if any voters cast more than one ballot by checking the number of ballots cast against the number of employees checked off on the Excelsior list used during the election, information which would be available from the Regional Office.

²¹ Employer's Exhibit 13 is a series of measurements Orozco made before the hearing based on her recollection of the conference room on the day of the election.

was a small television on this counter during the election. It is uncontested that there was a flat screen television mounted on the wall next to the door of the conference room. Er. Ex. 7I.

During both sessions of the election, there was a conference table to the right of the room from the doorway at which the observers and Board Agent sat. The two observers sat to the right of the table, with their backs to the right wall of the room, and the Board Agent sat at the far end of the table, near the windows and facing the door. Napolitano sat closer to the window and Orozco sat closer to the door of the room. Tr. at 339-40 (Napolitano), 454 (Orozco). This table is also depicted in Employer's Exhibit 7.

The Board Agent brought to the election a three sided voting booth, which is constructed to sit on a table or on a base. The side panels of the voting booth measure 17 inches wide by 22 inches high. The center panel is 17.5 inches wide by 22 inches high. There are notches at the bottom of the booth which fit into a standing base. The base was not used during this election.²² At the front of the side panels, the notch measures 3.25 inches long by 0.75 inches high. At the back of the side panels, in the corners where the side panels meet the back panel, the notches measure a little less than 2 inches long by 0.75 inches high. On the bottom of the back panel, there are notches on each side measuring 1.25 inches long by 0.75 inches high. Tr. at 214-16. Employer's Exhibit 20 L through 20 R is a series of photographs which show the type of voting booth used in this case.²³

During the morning session, the voting booth was placed at the end of the counter by the windows, just before the shelf. The ballot box was also on the counter, closer to the door. There

²² The Employer argues that the Board Agent should have used the voting booth with the base as a unit and it was misconduct for her not to do so. Tr. at 1007. To this end, the Employer sought to introduce a series of photographs showing the booth with the base. I rejected this argument as too speculative and rejected the photographs of the base because they were not used in this election and therefore not relevant evidence. Tr. at 1021-22.

²³ The voting booth photographed is not the voting booth used in the election, but is identical to the booth used.

was considerable testimony about the exact orientation of the opening of the voting booth and how employees used the voting booth when they voted. Employer's Exhibits 8A and 8B and 21A through 21G show the location of the voting booth and the ballot box during the morning session.²⁴

During the afternoon session, a second conference table was placed next to the counter. Tr. at 210. This table was 29 inches high. Er. Ex. 13. The voting booth was placed at the end of this table closest to the windows. The opening of the voting booth faced the back wall of the room and the windows. Employer's Exhibits 9A, 9B, 9C, 21H, 21I, and 21J depict the location and orientation of voting booth during the afternoon session.²⁵

The Testimony of the Observers

Napolitano

Napolitano testified that at the beginning of the morning session the voting booth was placed on the counter next to the shelf. Tr. at 334. According to Napolitano, the booth was oriented so that the opening was directly facing the shelf. Tr. at 330-31. The voting booth is shown in this position in Employer Exhibit's 21F and 21G. Napolitano explained that voters had to lean over the counter in order to vote in the booth. Tr. at 336. Napolitano testified that the booth did not move from that position during the first polling session. Tr. at 332, 335, 342. She testified that she could see voters' arms and shoulders outside of the booth while they voted. Tr. at 341.

²⁴ The photographs in Exhibit 8 were taken before the hearing. The Employer used a cardboard box as a mock voting booth to show the location of the voting booth. Employer's Exhibit 21A through 21G show the counter with a copy of the voting booth which the Employer ordered from the manufacturer. These pictures were taken during the course of the hearing. The Employer brought the copy of the voting booth to the hearing and I examined the copy with an official Board voting booth. The two are identical in shape and size. I admitted these photographs to show the location of the voting booth.

²⁵ As with Exhibit 8, the photographs in Exhibit 9 were taken before the hearing and use a cardboard box to depict the voting booth. Employer's Exhibit 21H through 21J show the second conference table with the copy of the voting booth from the manufacturer.

Napolitano testified that the small television on the shelf in the photographs in evidence was not there on the day of the election. Tr. at 342. Brian Walsh and Ricky Elliott also testified that they did not see a small television in the room on the day of the election. Tr. at 1109 (Walsh); 284 (Elliott).

During the second session, a second conference table was brought into the room. According to Napolitano, before the second session started, there was a general discussion that this table would give people more room to vote, but she could not recall any specific comments from this discussion. Tr. at 345.

Orozco

Orozco testified that during the election, from where she sat at the conference table, the counter was across the room and to her right. Tr. at 454. During the morning session, Orozco estimated that she was sitting about nine feet away from the voting booth. She estimates that Napolitano would have been seven feet and ten inches from the voting booth. Er. Ex. 13.

According to Orozco, when the polls opened in the morning, the voting booth was positioned on the counter so that it was angled facing the back wall and the windows of the conference room. It was not directly facing the shelf. The voting booth appears similar to this position in Employer Exhibits 8 and 21A through 21C. The Employer's attorney asked Orozco a series of leading questions about what she saw during the morning voting session:

- Q: From where you were sitting that day when the voting shield was at the angle [described above] could you see through those slots on the bottom?
- A: Yes.
- Q: Could you see the ballot when it was placed between the sides of the shield through those slots on the day of voting?
- A: Yes.
- Q: Could you see people, not people but voters arms or hands inside the shield through those slots on the day of voting?
- A: Yes.
- Q: Could you see their arms moving and their hands moving through those slots?

A: Yes.
Q: Could you tell which side of the shield their hand was on?
A: Yes.
Q: Could you see their shoulders with that setup of the voting shield?
A: Yes.

Tr. at 458-59. Orozco testified that during the first voting session, employees moved the voting booth so that the opening of the booth was more open to the room, but still angled somewhat toward the end of the room with the windows. Tr. at 459. The Employer's attorney again asked a number of leading questions:

Q: As the opening was moving more toward the front of the counter could you see voter's hands inside the shield?
A: Yes.
Q: Could you see their arms inside the shield?
A: Yes.
Q: Could you see their ballot inside the shield?
A: Yes.
Q: Could you see which side of the ballot their hand was on inside the shield?
A: Yes.
Q: Could you see their back?
A: Yes.
Q: Could you see their shoulders moving?
A: Yes.

Tr. at 460. Orozco then testified that by the end of the morning voting session, the booth had been moved so that the opening of the booth was open to the room and the back of the voting booth would run almost parallel to the back wall of the counter. Tr. at 461. Regarding this configuration, Orozco testified as follows:

Q: In the configuration that you have it now where it is more open than you showed us in the past could you see the ballots inside the voting shield as voters voted?
A: Yes.
Q: Could you see voters' hands inside the shield as they voted?
A: Yes.
Q: Could you see their arms move inside the shield?
A: Yes.
Q: Could you see their shoulders move?
A: Yes.
Q: Was their back toward you or the wall when they voted, when it was in this

configuration?
A: Their back was towards me.
Q: Could you see their elbows moving when they voted, when it was in this configuration?
A: Yes.
Q: And if I asked you this I apologize to everyone. When it was in this configuration could you see which side of the shield the voter had their hand?
A: Yes.

Tr. at 462.

On cross-examination, Orozco again testified that in the morning session, she could see voters' ballots through the notch at the bottom of the front of the side panel. Tr. at 521. When asked if she could see the entire ballot through that notch, she responded: "It depends. Some voters didn't have the sheet all the way inside. So, they had it out there. The box was moving through the whole election. So you could see the sheet." Tr. at 522. When asked again if she could see the entire ballot, she stated: "Yes, it all depends on what view you were seeing it from." Tr. at 523. When asked about the position of the booth when she could see the ballots, Orozco stated: "The box was at position. And as voters went in they didn't put the sheet all the way inside. And some of them were standing to the side and you could see or when the box moved throughout the election I would see in the box." Tr. at 523. Then Orozco testified that she could see "half of the edge of the ballot" of some voters. Tr. at 524. Orozco stated that she could see the backs or the sides of voters while they were voting during the morning session. Tr. at 541.

Orozco could not recall how many people voted during the first session. When asked if it was more than ten people, she stated she did not know. Tr. at 537. When asked how many times the voting booth moved, she stated she did not know, but it was more than twice. She could not state whether it was more than three times or less than five times. Tr. at 537-38. When asked what position the voting booth was in at the end of the first session, Orozco again stated that she did not know, explaining: "I didn't pay attention. I didn't look at them. I didn't look at the box.

So, I don't know." Tr. at 538-39. Orozco further testified that voters could move the booth so it could be more private. Tr. at 540.

During the afternoon session, when the second table was in the conference room, the voting booth was on the table, facing the back of the room. Tr. at 472-73. Orozco stated that the table was brought in because "employees mentioned that there wasn't enough privacy during the first election. They felt that they could be seen." Tr. at 473-74. She did not know who had complained and could not provide any details to support this assertion. On cross-examination, Orozco stated that employees told her there was not enough privacy in the morning session, but she could not remember to whom she spoke or where these conversations occurred. Significantly, she could not remember if the employees who allegedly complained about the voting booth voted during the morning session. Tr. at 547.

For the afternoon session, Orozco sat in the same position where she had sat in during the morning session. Tr. at 478. Orozco estimated that she was six feet and three inches from the voting booth and that Napolitano was five feet two inches from the voting booth. Tr. at 473; Er.

Ex. 13. Regarding this session, Orozco testified as follows:

Q: During the afternoon voting session from where you were sitting could you see through those holes on the bottom of the shield?

A: Yes.

Q: Could you see paper ballots on the table through those holes in the shield?

A: Yes.

Q: Could you see people's hands or arms through the holes on the voting shield from where you were sitting?

A: Yes.

Q: Could you see which side of the voting shield a person had their arm or hand while they were voting in the afternoon --

A: Yes.

Q: through those holes in the shield?

A: Yes.

Tr. at 478-79.

On both direct and cross-examination, Orozco testified that there was a small television on the shelf at the end of the counter during the first and second voting sessions. Tr. at 465, 543. She testified that she could see reflections in this television of voters filling out their ballots in the morning and in the afternoon sessions. Tr. at 466, 545-46, 559.

Orozco stated that she never raised any concerns about the privacy of the voting booth with the Board Agent. Tr. at 539.

Voters' Testimony

Jillian Jacques²⁶ voted in the morning session. Jacques testified that when she voted, the booth was on the counter with the opening of the shield directly facing the shelf of the counter. When she voted, Jacques stated that she had to “go behind” the booth to vote. Tr. at 382-84. She also testified that the small television was not in the conference room during the election. Tr. at 400.

Doreen Dande voted in the morning session. Tr. at 562. When she voted, the booth was on the counter and angled with its opening facing the back wall of the room toward the windows. Tr. at 563-65. Employer's Exhibit 21A shows the booth similar to the orientation as described by Dande. Dande stated that her back was facing the Board Agent and the two observers when she voted. Tr. at 564. Dande testified that the observers could see her “whole voting move,” and whether her hand moved to the right or the left. Tr. at 566. According to Dande, there was a small television on the shelf of the counter and Dande said that she could see her arm move in the reflection of the television. She further testified that people “could possibly see” inside the booth while she voted. Tr. at 567. On cross examination, Dande testified that while she was voting, she saw her whole body from the waist up, the two observers, and the Board Agent in the

²⁶ Although Jacques served as a roving observer, I include her testimony here because she did not serve as an observer in the conference room.

reflection of the television screen. Tr. at 579-81. According to Dande, the observers could see her hand in the reflection of the television. Tr. at 580.

Michelle Grey also voted during the morning session. Tr. at 789. According to Grey, the voting booth was on the counter, and the opening was angled toward the back wall. Tr. at 790-91. Her description of the position of the booth is similar to the depiction of the booth in Employer's Exhibit 21A. Grey testified that when she voted, she tried to cover her ballot with her body because Napolitano was sitting behind her. Tr. at 792. Grey further testified that there was a small television on the shelf on the counter. She could see the observers in the reflections of the television. Tr. at 792. Grey stated that she could see her shoulder and her back in the television screen, but could not see her ballot or her hands in the reflection of the television. Tr. at 799.

Isabel Estrada also voted during the morning session. Tr. at 608. Estrada testified that when she voted, the booth was on the counter and the back of the booth was against the wall behind the counter so the booth was open to the room. Tr. at 610. The Board Agent and the observers were sitting behind Estrada as she voted. Tr. at 614.

Beatrice Beauvior also voted in the morning session. Tr. at 626. Beauvoir testified that when she voted, the back panel of the voting booth was against the wall of the counter, and the opening was facing the room. Tr. at 628-29. Napolitano was behind Beauvior when Beauvior voted. Beauvior testified that there was a small television on the shelf of the counter, as is depicted in Employer's Exhibit 8A. Tr. at 631. She could see reflections of the observers and the Board Agent in the television. Tr. at 632. On direct examination, Beauvior testified that the people in the room could see her arms move and how she marked her ballot. Tr. at 629-30. However, on cross-examination, Beauvior admitted that the observers and the Board Agent could

not see her ballot because she blocked her ballot with her body. She testified, “when I voted I blocked myself from anybody seeing me.” Tr. at 648. When asked whether anyone saw her make her ballot, she said, “No, they didn’t see it.” Tr. at 649.

Michelle Moore voted during the morning session. Tr. at 670. When Moore voted, the back of the voting booth was pushed against the wall behind the counter and the booth was open to the room. Tr. at 671-72. Napolitano was directly behind Moore when she voted. Tr. at 672. Moore also testified that there was a small television on the shelf next to the voting booth, as is shown in Employer’s Exhibit 8A. Tr. at 674-75. On direct examination, Moore testified that people could see her arms move while she voted and could see which side of the voting booth her arms were on while she voted. Tr. at 673. On cross-examination, Moore testified that she did not know if anyone in the room was watching her arms. Tr. at 1069. During examination by the Hearing Officer, Moore testified, “you might not see my hand move but I’m pretty sure you could see if my shoulder’s moving” and stated “I can’t say whether or not they actually saw my hand move.” Tr. at 1076.

Maharanie Mangel also voted during the morning session. She testified that when she voted, she was facing the wall behind the counter. Tr. at 1216. The observers were behind her and the Board Agent was to her right. Tr. at 1200-01. Mangel testified that when she voted, the back of her arms from her shoulders to her elbows were visible to the others in the room. Tr. at 1216-17. She testified that she did not believe anyone could see her ballot because the people in the room were facing her back and could not see to the right or the left of her because of the booth. Tr. at 1185, 1203. Mangel testified that there was no small television in the room when she voted. Tr. at 1185.

Eric Carpio voted in the afternoon session, when the voting booth was on a second conference table. The opening of the booth was facing the back wall of the room, towards the windows. Tr. at 766-67. The booth appears in this position in Employer's Exhibits 9 and 21H through 21J. Carpio testified that there was a small television on the shelf of the counter, as is shown in Employer Exhibit 8A. Tr. at 765. Carpio testified that in the afternoon session, he could see reflections of the voting booth, the flat screen television mounted on the wall, and the observers in the small television. Tr. at 766. Carpio testified that when he voted, the booth covered him to his mid-chest.²⁷ Tr. at 767. Carpio stated he thought you could see how his arms and shoulders were moving while he was voting. Tr. at 768.

Tracey Thomas also testified about voting the afternoon session. She testified that the room looked like it is shown in Employer's Exhibit 9, including the location of the small television. Tr. at 816-17. Thomas testified that while she was voting, she was wondering if anyone was looking at her, and if they could tell how she was voting. Tr. at 1100. She did not provide any details about why she thought this.

Crystal Pratts, Elaine Mabilangan, and Miguel Roque voted in the afternoon as well, but did not testify about their use of the voting booth. Pratts testified that the room was set up as Carpio testified, although she did not specify whether the television was on the shelf. Tr. at 707, 710-11. Mabilangan testified that there was a small television on the shelf of the counter. Tr. at 724-25. Mabilangan described the voting booth as the "private voting section." Tr. at 727, 737. Roque could not recall whether there was a small television in the room when he voted. Tr. at 809.

With regard to the television, Doreen Illis also testified that there was a small television on the counter as shown in Employer's Exhibits 8 and 9. Tr. at 1002. Illis testified that before

²⁷ When he testified, Carpio pointed to his chest at shoulder height. Tr. at 767.

the election, she dusted the television. Tr. at 1003. Illis testified that she did not place the television in a way that could compromise the secrecy of the ballots. Tr. at 1005.

Credibility

The testimony regarding the use of the voting booth and the privacy of the ballots raises a number credibility issues. Much of the testimony was developed entirely through leading questions on direct examination and many witnesses contradicted themselves throughout the course of their testimony.

The testimony about the arrangement of the room and the voting booth during both sessions is uncontroverted and I generally credit the witnesses' testimony on these points. I credit the employees who testified that the voting booth was in a number of different positions during the morning session. Given the weight of this testimony, I do not credit Napolitano's testimony that the voting booth did not move from its position during the first voting session.

With regard to the secrecy provided by the voting booth, it is uncontroverted that voter's arms, backs, and shoulders were visible. Napolitano testified that she could see voter's shoulders and arms outside of the voting booth. Michelle Grey also testified that that her shoulder and back were visible when she voted. Beauvior testified that she knew no one saw her ballot because she blocked it with her body. Michelle Moore testified that her shoulders were visible when she voted, but could not state that anyone could see her hands as she voted. Mangel testified that the back of her arms from her elbows to her shoulders were visible when she voted, and that no one could see her ballot. Eric Carpio testified that his arms and shoulders were visible above his mid-chest. I generally credit this testimony.

I do not find Sheena Orozco's testimony regarding the privacy of the voting booth credible. Orozco testified on direct examination, entirely through leading questions, that she

could see voters' ballots and hands through the notches of the voting booth and that she could tell which side of the voting booth voters' hands were on when they marked their ballots during both the morning and afternoon sessions. Moreover, Orozco stated that she could see voters' movements in the reflection of the small television in the corner during both sessions. Orozco offered no independent testimony regarding what was visible during the polling, and offered no details about the ballots she allegedly saw, such as how many ballots she saw, or whose ballots she saw.

Orozco's account is not believable. The voting booth was in entirely different locations during the morning and the afternoon sessions. In the morning, voters were placing their ballots on a counter that was three feet high. In the afternoon, they were using a conference table that was 29 inches high, seven inches lower than the counter. By Orozco's own measurement, she was almost three feet closer to the voting booth in the afternoon than in the morning session. The notches in the voting booth are 0.75 inches high and between 1.25 to 3.23 inches long. Given the difference in the location of the voting booth (including height and proximity) during the morning session and the afternoon session, and the size of the notches in the booth, the size and location of the television, I do not find it credible that Orozco saw voters ballots, hands, and how they marked their ballots through the notches in the voting booth.

Moreover, on cross-examination, Orozco's testimony was extremely inconsistent. She stated that she could see voters' ballots through the notch at the front of the booth. Then she explained she could see voters' ballots when the voters did not put their ballots in the voting booth. Then Orozco testified that she could see voters ballots when the booth was moving, although she could not state how many times the booth moved, or even whether the booth moved more than three times. Orozco could not state whether more than ten people had voted during

the morning session. Orozco admitted that she did not pay attention or look at the voting booth. Significantly, despite her testimony that she could see voters' ballots, Orozco stated that she never raised any concerns about this with the Board Agent.

I do not credit Orozco's testimony that employees complained to her about the privacy of the voting booth during the morning session. Orozco was unable to identify even one employee who made these alleged complaints. In fact, she could not even state whether anyone who complained had voted during the morning session.

There was contradictory testimony about whether there was a small television on the counter. Napolitano, Jacques, Walsh, Elliott, and Mangel all testified that there was no television on the counter on election day. Miguel Roque could not recall if there was a television on the counter. Almost every other witness testified that there was a small television on the counter as depicted in the photographs in evidence, including Grey, Moore, Carpio, and Thomas. Illis testified that she dusted the television prior to the election.

Many of those who testified that they saw a small television on the shelf of the counter offered details about the television, and I generally credit this testimony. However, I do not credit Orozco and Dande's testimony that voters' ballots were visible in the television reflection. Orozco testified that she could see voters' ballots in the television screen during both the morning and afternoon sessions. As discussed above, given the change in location of the voting booth during the morning and afternoon session, I do not find this testimony believable. Dande testified that as she was voting, she could see herself, the two observers, and the Board Agent in the reflection of the small television. She also testified that the observers could see the reflection of her hand in the television as she voted. I do not find it plausible that someone standing next to a small television screen could see herself from the waist up and three people who were sitting

several feet away and to both sides of her. I do not credit Dande's testimony that the observers could see how she marked her ballot in the television screen given the height of the television from the ballot, and the angle of the television, which would have been facing out into the room and not toward the counter and the voting booth.

Discussion

In cases involving allegations of Board Agent misconduct, the Board has ruled that where "the alleged misconduct is the Board agent's failure to ensure the secrecy of the balloting, the Board will not set aside the election under the Polymers standard absent evidence that someone witnessed how a voter marked his or her ballot." Physicians & Surgeons Ambulance Service, Inc. d/b/a American Medical Response, 356 NLRB No. 42 (2010) citing Polymers, Inc., *supra*, and Avante At Boca Raton, 323 NLRB 555, 558 (1997); *see also* St. Vincent Hospital, 344 NLRB 586, 587 (2005) (upholding an election even though two employees may have been in the voting booth at the same time because there was no evidence that either employee saw how the other employee marked his or her ballot). In Physicians & Surgeons Ambulance Service, the election was held in a crew room of the employer's facility. The Board Agent used a three-sided, "table-top" voting booth. As the Board described the voting booth, "[u]nlike the Board's standard metal booth, which is a stand-alone cubicle with curtains that shield voters from head to lower torso, the Board's alternative table-top booth shields voters' lower arms and hands as they mark their ballots within the hollow confines of the booth." During the election, the Board Agent in that case placed the voting booth on a table. The Board Agent and the observers sat at another table four or five feet away from the voting booth. The employer did not object to this arrangement. In support of its objections, the employer submitted affidavits of two employees who "generally contested the Board's failure to provide them a more private voting

environment.” Significantly, these employees did not state that anyone had seen how they marked their ballots or any other voters’ ballots, or even that they thought anyone had seen their ballots. The Board concluded “[a]bsent evidence that their ballots were seen, we find no basis under the Polymers standard to question the fairness and validity of the election.”

Physicians & Surgeons Ambulance Service is directly on point and controlling in the instant case.²⁸ In this case, the Board Agent used the three-sided table-top voting booth and placed it on the counter of the conference room during the morning session and on a second table during the afternoon session. The observers and the Board Agent were stationed several feet away from the voting booth at another table, further from the voting booth than the observers in Physicians & Surgeons Ambulance Service. According to Orozco’s estimates, she was nine feet from the voting booth in the morning and more than six feet in the afternoon. By her measurements, Napolitano was almost eight feet away from the voting booth in the morning and more than five feet away from the voting booth in the afternoon. As in Physicians & Surgeons Ambulance Service, the parties did not object to the arrangement of the voting booth prior to the election.

Most importantly, there is no credible evidence in the record that anyone saw how any voter marked his or her ballot. Beatrice Beauvior testified that she knew no one saw her ballot because she blocked the view of her ballot with her body. Michelle Moore testified that while people in the room could see her shoulders, she could not state whether anyone saw her hands while she voted. Michelle Grey testified that she could see the reflection of her shoulder and back in the small television on the counter, but could not see her ballot or her hands reflected in

²⁸ Although Physicians & Surgeons Ambulance Service was decided on November 30, 2010, after the record in the instant case had been closed, the Board will apply new policies and standards to all pending cases, regardless of the stage of the case. See SNE Enterprises, Inc., 344 NLRB 673, 673 (2005).

the television. Carpio testified that the voting booth covered him from mid-chest to his hands. There is also no evidence that employees reasonably thought their ballots had been seen. Tracey Thomas testified that while she voted she wondered if anyone could tell how she voted, but did not elaborate. Doreen Dande testified that she thought the observers “could possibly see” inside the booth while she voted, but did not support this assertion in her testimony. These vague impressions about the privacy of the voting booth, like those offered by the witnesses in Physicians & Surgeons Ambulance Service, are not sufficient to set aside this election.

Significantly, aside from Orozco’s testimony which I have discredited, the Employer does not assert that there is any other evidence that any voter’s ballot was seen. Tr. at 386. Throughout the hearing, the Employer maintained that this case is controlled by Columbine Cable Company Inc., 351 NLRB 1087 (2007). Tr. at 387, 1299. In Columbine, two voter arrived to vote after the Board Agent had dissembled the voting booth. The two voters voted without any voting booth or private area. The voters’ arm movements were fully exposed to the Board Agent and the observers, who watched the two voters vote. In addition, their ballots were visible to the observers. Columbine, 351 NLRB at 1087. In Physicians & Surgeons Ambulance Service, the Board distinguished the facts of Columbine from cases in which a voting booth is used, as in the instant case. “When such a booth is used, the Board’s analysis is limited to whether a voter’s ballot marking was observed by others while voting, or before the ballot was deposited in the ballot box.” Physicians & Surgeons Ambulance Service. Columbine is not instructive in this case.

In sum, the Employer has presented no evidence that the conduct of the Board Agent affected the election. While it is undisputed that the polls opened late for the morning session, the record does not establish that the election should be set aside for this reason. The Employer’s

allegations regarding the conduct in the conference room during the election, such as the level of noise, are also not supported by evidence which would warrant setting aside an election. Finally, the record establishes that the voting booth provided adequate privacy for voters in this election. Accordingly, I recommend overruling the Employer's seventh objection.

Objections Nos. 9 and 10

In its ninth objection, the Employer alleges that during the critical period, the Petitioner promised employees monetary rewards and other benefits in exchange for supporting the Petitioner, and promised certain employees monetary rewards and other benefits if the Petitioner won the election. In its tenth objection, the Employer alleges that the Petitioner falsely represented to employees that they were only eligible to vote if they had signed an authorization card, a "voter eligibility" card, or another document supplied by the Union.

Facts

Crystal Pratts testified that she heard that Jillian Jacques was getting a commission for supporting the Union. Tr. at 713. Pratts stated that she heard this as a "rumor" in the facility and could not recall who told her this information. Id. Similarly, Michelle Grey and Tracey Thomas both testified that they heard that Napolitano would get money if the Union won the election. Tr. at 794 (Grey), 819 (Thomas). Neither witness offered any detail about how they heard this information, such as from whom, when or whether anyone else was present who could corroborate this testimony.

Sheena Orozco testified that she heard that the Petitioner had offered some employees money, stating "depending on how many employees they get, they would get compensation for it." Tr. at 494. Orozco did not specify to whom she was referring or how she had heard this

information. Orozco also stated that Napolitano told her that it did not matter if Napolitano got fired because the Union would keep paying her. *Id.* Orozco further testified that she overheard employees saying that they had to sign a voter registration card to be able to vote. *Tr.* at 491. Orozco did not offer any details about any of these conversations, such as when or where they occurred, or whether anyone could corroborate her testimony.

Aurea Rodriguez works as a cook at Somerset. *Tr.* at 850. She also works at another nursing home where she is represented by the Petitioner and pays dues. *Tr.* at 851-52. According to Rodriguez, Napolitano told her that if she voted for the Petitioner at Somerset, she would not have to pay dues at Somerset. *Tr.* at 852. Rodriguez did not provide any details about this conversation, such as when or where it occurred, or whether anyone else was present who could corroborate this testimony.

Eric Carpio testified that prior to the election, Brian Walsh offered to put him on the Petitioner's payroll if Carpio would get employees to support the Union. Carpio stated that Walsh did not give him any specific details regarding this offer. *Tr.* at 771. Carpio did not offer any details about this conversation, such as when or where it occurred, or whether anyone else was present who could corroborate this testimony.

Walsh denied that he ever offered Carpio, or any other employee, a place on the Petitioner's payroll in return for getting employees to support the Petitioner. Walsh further denied that he ever told any voter that they would get a commission if they got their co-workers to support the Union. *Tr.* at 1108. Walsh testified that he did not promise any type of employment relationship to any employee who voted in the election. *Tr.* at 1151. He further denied that he ever promised a job to Napolitano prior to the election. *Tr.* at 1151.

Napolitano testified that she was never offered any kind of commission or other incentive by the Petitioner while she was working for the Employer. Tr. at 365.

Inez Konjoh, the director of nursing, also testified that prior to the election, in the employee dining room of the Employer's facility, she overheard two employees, Brian Cooper and another employee named Elsie, stating that they heard that they had to register to vote. Konjoh testified that she told the employees that they did not have to register to vote. According to Konjoh, "they said, 'yeah, now they're telling us we have to register to vote.'" Tr. at 863. Konjoh did not specify when this conversation occurred. Doreen Illis testified that prior to the election, the Employer told employees that anyone who was described in the unit could vote. Tr. at 1106.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of these witnesses, I generally credit the testimony of Pratts, Grey, Thomas, and Orozco that they heard rumors about employees getting commissions for securing support for the Petitioner. However, I do not rely on this hearsay evidence. Hearsay is admissible in Board proceedings if it is "rationally probative in force and if corroborated by something more than the slightest amount of other evidence." Dauman Pallet Inc., 314 NLRB 185, 186 (1994), quoting RJR Communications, Inc., 248 NLRB 920, 921 (1980). In this case, the hearsay offered by the Employer is not supported by sufficient evidence to render it reliable. None of these employees could recall where, when, or from whom they had heard these claims. Pratts even characterized the claim that Jacques was receiving a commission as a rumor she had heard in the facility. Most significantly, this hearsay testimony was not corroborated by any direct evidence. Moreover, the

claims regarding employees receiving commissions are rebutted by Walsh and Napolitano's denials, which I find credible.

Eric Carpio testified that Brian Walsh offered to put him on payroll if Carpio convinced other employees to support the Union but stated that Walsh did not give him any specifics about this offer. Carpio himself offered no details about this conversation, such as when or where it took place. Walsh specifically denied that he offered Carpio or any other employee any benefit for convincing their co-workers to support the Union. Given the vague nature of Carpio's testimony on this point, I credit Walsh's denial over Carpio's testimony.

Orozco and Aurea Rodriguez both testified that Napolitano made certain representations to them. Neither witness offered any specifics regarding these alleged conversations, such as when or where they occurred, or if any witnesses could corroborate them. The Employer has offered no direct evidence to corroborate either witness's account. For the reasons stated above, I do not rely on this hearsay evidence.

I also generally credit the testimony of Orozco and Konjoh that they heard employees discussing the need to register to vote. This hearsay is also uncorroborated by any direct evidence. See Dauman Pallet Inc., supra. Orozco again offered no details to substantiate the alleged comments. Although Konjoh's testimony was more detailed, as she provided the names of employees whom she overheard and where the conversation took place, the hearsay remains unsubstantiated. I do not rely on this evidence. I credit Illis' testimony that the Employer told employees they were eligible to vote if their jobs were included in the unit description.

Discussion

In this case, the Employer offered mere hearsay of rumors relating to commissions and the alleged requirement that employees register to vote in the election. Such evidence alone is

not sufficient to support an objection and will not provide a basis on which to set aside an election. See House of Raeford Farms, 317 NLRB 26 (1995) (in which the Board overruled an objection supported only by hearsay, ruling that it was “insufficient to warrant setting aside the election”). I find that the Employer has not offered sufficient evidence to support its ninth or tenth objection.

Significantly, none of the witnesses who testified stated that these claims had been made or disseminated by the Petitioner.²⁹ According to Konjoh, whose testimony was by far the most specific, the employees to whom she spoke stated only that “they’re telling us we have to register to vote.” Tr. at 863. The Employer has not established that the Petitioner engaged in the alleged conduct.

The only witnesses who did identify the source of information were Orozco and Rodriguez, who testified about comments allegedly made by Napolitano. Even crediting Rodriguez and Orozco’s testimony about these comments, such statements cannot be attributed to the Petitioner. As an employee of the Employer, Napolitano was not an agent of any party to the election,³⁰ and her conduct must be examined under the standard for third-party conduct. Such conduct may serve as a basis on which to set aside an election, but only if that conduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” Westwood Horizons Hotel, 270 NLRB 802, 803 (1984); see also Phoenix Mechanical, 303 NLRB 888 (1991). In evaluating whether threats made by third-parties are objectionable under this standard, the Board will consider whether the threat encompassed the entire bargaining unit, whether the threat was disseminated widely within the unit, whether the

²⁹ As discussed above, I do not credit Carpio’s testimony that Walsh offered him a job if he convinced employees to support the Union.

³⁰ There is no allegation or evidence that Napolitano made these alleged comments while acting as an observer for the Petitioner.

person making the threat was capable of carrying it out, whether it is likely that employees acted in fear of this party's capacity to carry out the threat, and whether the threat was "rejuvenated" close in time to the election. Westwood Horizons Hotel, 270 NLRB at 803. Under this standard, the Board has held that third-party conduct is objectionable when it includes multiple threats of harm, physical injury, and damage to property of employees who do not support the union or who stated that they would cross a picket line. See Robert Orr-Sysco Food Services, LLC, 338 NLRB 614 (2002); see also PPG Industries, Inc., 350 NLRB 225 (2007) (finding objectionable threats to damage the cars of and cause physical harm to employees who did not support the union).

Napolitano's alleged comments do not rise to the standard of objectionable third-party conduct. The alleged statements, which cannot be characterized as threats, do not encompass the bargaining unit and there is no evidence that they were disseminated to employees other than Orozco and Rodriguez. There is no evidence that Napolitano made such claims close in time to the election. Most significantly, there is no basis to find that any employee acted in fear because of these alleged comments. Napolitano's alleged comments about commissions and dues would not create an atmosphere of fear and reprisal contemplated by the Westwood Horizons Hotel line of cases.

For the foregoing reasons, I recommend overruling the Employer's ninth and tenth objections.

The Employer's Rebuttal Case

On rebuttal, the Employer alleged that the Petitioner had tampered with one of the Employer's witnesses. On the last day of the hearing, Tracey Thomas testified that while

waiting to testify on cross-examination, she was sitting in the lobby of the NLRB offices with another witness, Aurea Rodriguez. According to Thomas, a man, whose name Thomas could not remember but who introduced himself as being with the Union, came over to them. Thomas testified that he told her: “[J]ust remember that when our lawyers ask you any questions to say as much as you can, but when the other people ask you questions, keep it short.” Tr. at 1243-44. That was the end of the conversation. Thomas stated that she testified truthfully during the hearing. Tr. at 1245-46.

I credit Thomas’s account of this conversation. Although she could not remember the man’s name, her testimony was straightforward and detailed. While the Petitioner objected to this testimony, the Petitioner offered no evidence to rebut Thomas’s testimony.

I do not find that this exchange impugns Thomas’s testimony or the testimony of any other witness in this case. This exchange was short and innocuous. The Union agent did not say anything coercive to Thomas. He did not attempt to discuss any specifics of Thomas’s testimony, which would have violated the sequestration order in effect for this hearing. Moreover, Thomas confirmed that she testified truthfully. There is no evidence that this exchange influenced her testimony or the testimony of any other witness. Significantly, Thomas was sitting next to another witness when the Union representative spoke to her, but according to Thomas’s account, the representative made no attempt to speak with the other witness. I do not find that the Petitioner interfered with the conduct of this hearing.

Recommendation

I have recommended approving the Employer’s request to withdraw Objections Nos. 8 and 14. I have further recommended overruling the Employer’s remaining objections.

Accordingly, I recommend that the Petitioner be certified as the exclusive bargaining representative for the following appropriate unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey facility, but excluding all office clerical employees, registered nurses, dietitians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefit coordinators, all other professional employees, guards and supervisors as defined in the Act.

Right to File Exceptions

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on February 2, 2011, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and

Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Brooklyn, New York, on this 19th day of January, 2011.

/s/ Rachel Mead Zweighaft
Rachel Mead Zweighaft
Hearing Officer
National Labor Relations Board, Region 29
Two MetroTech Center
Brooklyn, New York 11201

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING
COMPANY, LLC d/b/a SOMERSET
VALLEY REHABILITATION &
NURSING CENTER

Employer

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST NEW JERSEY REGION

Petitioner

22-RC-13139

Date of Mailing: January 19, 2011

AFFIDAVIT OF SERVICE OF: HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS. I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled documents(s) by regular mail upon the following persons, addressed to them at the following addresses:

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Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Subscribed and sworn to me this 19th

DESIGNATED AGENT

of January, 2011

NATIONAL LABOR RELATIONS BOARD

Lynda Tofte
Cynthia
per